No. 96 945 DEC 10 1996

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In The

Supreme Court of the United States

October Term, 1996

R. DERRY CROSBY, D.O.,

Petitioner,

vs.

HOSPITAL AUTHORITY OF VALDOSTA AND LOWNDES COUNTY d/b/a SOUTH GEORGIA MEDICAL CENTER, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Do state law and policy requiring the defendants to compete on equal terms in the marketplace, and prohibiting the exact anti-competitive conduct which is challenged in the complaint, govern a federal court's antitrust "state-action" analysis?

II. Is the "active supervision" prong of this Court's *Midcal* requirement satisfied when the co-conspirator "government" authority supervises its own anti-competitive conduct?

III. Under the "state action" doctrine, are undeniably anti-competitive decisions by private health care providers, and their motives, immunized from antitrust scrutiny because those independent competitors also serve as agents for a hospital authority acting in a proprietary capacity?

LIST OF PARTIES

The parties to the proceeding below were petitioner*, R. Derry Crosby, D.O., and the following respondents and parties of interest, as identified:

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Oscar E. Aguero, M.D.
Charles O. Barker, M.D.
Dewey L. Barton, M.D.
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Earl L. Creech, M.D.
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Wylie L. (Don) Drury, M.D.
William Gee, M.D.
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John P. Kendrick, M.D.
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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 93 F.3d 1515 (11th Cir. 1996) and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a. The opinion and order of the United States District Court for the Middle District of Georgia granting respondents' motions for summary judgment is reported at 873 F. Supp. 1568 (M.D. Ga. 1995) and is reproduced at Pet. App. 50a.

STATEMENT OF JURISDICTION

The judgment for the United States Court of Appeals for the Eleventh Circuit was issued on September 11, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND OTHER AUTHORITY INVOLVED

1. 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

2. 15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The following statutes are also involved and are found in Petitioner's Appendix:

1. Constitution of the State of Georgia, Art. 3, § 6, ¶ 5(c)

2. O.C.G.A. § 20-3-475

3. O.C.G.A. §§ 20-3-476(a), (b) and (c)

4. O.C.G.A. § 20-3-512

5. O.C.G.A. § 20-3-513

6. O.C.G.A. § 43-34-20

7. O.C.G.A. §§ 43-34-21(a) - (d), (f)

8. O.C.G.A. § 43-34-3(a)

STATEMENT OF THE CASE

This petition follows the Eleventh Circuit's affirmance of the District Court's grant of defendants motion for summary judgment on the Sherman Act Section 1 restraint of trade, Section 2 monopolization and attempted monopolization, and Section 2 conspiracy claims arising from respondents' anticompetitive scheme to exclude petitioner from the Lowndes County healthcare market. The District Court held that both, the Hospital Authority, as well as all private defendants were public actors and, therefore, entitled to immunity under the state action exemption of *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943) and its progeny by virtue of participating in a decision to deny petitioner, an osteopathic orthopedic surgeon, staff privileges at South Georgia Medical Center ("SGMC").

In affirming the District Court, the Eleventh Circuit held that the "active supervision" prong of this Court's decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980) (*"Midcal"*) was satisfied when the co-conspirator "government" authority supervises its own anti-competitive conduct (Pet. App. 48a). The Court of Appeals expressly disavowed the explicit provisions of the Georgia Constitution and state legislative provisions and policy, thereby protecting respondents from antitrust scrutiny and violating the core federalism concerns which give rise to the antitrust "state action" doctrine. (Pet. App. 43a).

The Court of Appeals also held, as a matter of law, that the District Court's finding that the private actors challenged conduct consisted exclusively of official actions taken as members of the hospital's peer review committees should be reviewed under a "clearly erroneous" standard. (Pet. App. 45a). Aside from creating a radical new standard for review of disputed facts in a summary judgment motion, the court utilized this artifice to try

to avoid this Court's holdings in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992) (*"Ticor"*); *Patrick v. Burget*, 486 U.S. 94, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988), *rehearing denied*, 101 L. Ed. 2d 952 (1988) (*"Patrick"*), and *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978) (*"City of Lafayette"*).

This case involves the denial of hospital staff privileges at SGMC to petitioner, who was an osteopathic physician. Petitioner sought privileges in the Orthopedic Surgery Service of SGMC. Petitioner's training in orthopedic surgery was at both, allopathic and osteopathic hospitals, and he was certified as an orthopedic surgeon by the American Osteopathic Board of Orthopedic Surgery. It was undisputed that petitioner's education and training met the standards of the Liaison Committee on Medical Education, as required by Article III, Section 23(f) of the SGMC By-laws.

The orthopedic service consisting of respondents' Creech, Aguero, and Kendrick, after repeated requests, finally concluded that Petitioner's request should be denied for two reasons:

First, petitioner's "training and experience did not make him eligible for formal exams by the American Academy of Orthopedics." and,

Second, they "felt that there are more than enough orthopedic surgeons active on the staff and in the Valdosta area at this time."[1]

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1. While the Court of Appeals concluded that the credentials committee apparently dropped the service's second ground, it impliedly recognized the service's first reason. The record before the Court of Appeals was clear that neither certification by nor eligibility for certification by the American Academy of Orthopedics was ever a by-law requirement for staff privileges in orthopedics at SGMC.

The Service concluded that "Petitioner" may be eligible for staff privileges at the Smith Hospital if he wishes to practice in Lowndes Co." (Pet. App. 94a).

The respondents' first reasons were without any foundation whatsoever. The by-laws never required eligibility for a formal exam by the American Academy of Orthopedics. It was undisputed that the Academy was strictly honorary and that membership was by invitation to selected orthopedic surgeons. It was also undisputed that none of the respondents could qualify for membership in the Academy.

The second reason was disingenuous. The record before the District Court clearly and indisputably revealed that respondents Creech, Aguero, and Kendrick either had family members who were going into practice with them, or had former colleagues who wanted to return to Valdosta to practice with them, or were taking in partners to practice with them.

The suggestion that Dr. Crosby could be permitted to practice at Smith Hospital in northern Lowndes County, which respondents' knew did not possess the same facilities or equipment as that as SGMC, indicated that the real reason why petitioner was denied staff privileges at SGMC was a matter of economics not of competency.

Petitioner was a qualified and certified orthopedic surgeon, licensed by the Composite Medical Board of Georgia[2], who was

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2. The Composite State Board of Medical Examiners is a board created by the Legislature of Georgia to be comprised of both, allopathic and osteopathic physicians. O.C.G.A. § 43-34-21(a) and (b) (Pet. App. 92a). Its purpose is to protect the public health and to control and regulate the practice of medicine and osteopathy. *Id.* (d) (Pet. App. 93a). The board administers a single test to all applicants to test their qualifications to practice medicine. *Id.* (f) (Pet. App. 91-93a).

educated, resided and practiced in Valdosta. The record below contained credible evidence that petitioner had received excellent training in the field of orthopedics and was regarded by his trainers and evaluators (both allopathic and osteopathic) as a highly skilled, knowledgeable and motivated orthopedic surgeon. The record is devoid of any negative comments of petitioner's skills or training.

The Eleventh Circuit concluded that despite a recent Georgia Supreme Court opinion holding that hospital authorities are not the state nor the county or even a part of the county, the policy reasons underlying state action immunity were so strong that "Georgia's hospital authorities are political subdivisions for state action immunity purposes." (Pet. App. 21a).

In reaching this conclusion, the court below ignored the Georgia Constitution's prohibition against anti-competitive conduct and a statutory scheme that conferred no greater powers on the authority than they do on a private business corporation, O.C.G.A. § 31-7-75. Specifically, O.C.G.A. § 31-7-75(18) gives the Authority the power to "appoint officers, agents, and employees". The specific intent of the Legislature was "to provide a mechanism for the operation and maintenance of needed health care facilities" in Georgia. O.C.G.A. § 31-7-76(a).

The Eleventh Circuit, in order to avoid its own prior decisions that a hospital and its staff are separate economic or legal entities capable of conspiracy with one another concluded that, for purposes of state action immunity, staff physicians may be agents of the hospital. (Pet. App. 49a). Thus, it transformed a private actor's conduct into that of the state and, while giving lip service to *Ticor, Patrick,* and *City of Lafayette* effectively emasculated those decisions. (Pet. App. 47a). It did that by concluding that since the Authority had the final vote on all staff appointments, it exercised control over peer review decisions. (Pet. App. 48a).

Once the court below concluded that the Authority was exercising control over peer review decisions, it concluded that the "active state supervision" requirements were met because the Authority was the "state". Thus, it reached the ultimate conclusion that the requirement of active state supervision was unnecessary to ensure that the challenged actions were those of the state. (Pet. App. 48a).

The Court of Appeals concluded that under O.C.G.A. § 31-7-15 its conclusion derived strong statutory support because peer review had to be done by individual physicians acting through peer review committees. (Pet. App. 35a). The court in relying on subsection (a) completely ignored § 31-7-15(c) which requires that any peer review conducted under § 31-7-15(a) or (b) must be carried out under the regulations and supervision of the Department of Health. The Department has never enacted regulations governing peer review and respondents never directed the attention of the court below or the District Court to any regulation or action of the Department of Health that even remotely resembled active state supervision of discriminatory peer review conduct. There is not a scintilla of evidence that Georgia's Department of Health has ever attempted to supervise any peer review conducted by any hospital in Georgia.

Despite this lack of evidence, the Eleventh Circuit went on to conclude that the Georgia statutory scheme made it reasonably foreseeable that anticompetitive conduct would be a result of the statutes authorizing the Authority to grant or deny staff privilege application. (Pet. App. 35a). The court reaches the astounding conclusion that the Georgia Legislature enacted statutes "which would lead hospital decision making to act anti-competitively in reaching staff membership decisions" despite the clear policy against anti-competitive conduct espoused in Art. 3 § 6 paragraph 5(c) of the Georgia Constitution. (Pet. App. 86a). In short, it concluded that a Legislature would knowingly and intentionally violate its state constitution.

The State of Georgia has provided funding for osteopathic physicians to return to rural Georgia. Moreover, Georgia has refused to condone discrimination between osteopathic and allopathic physicians. In essence, the Court of Appeals improvidently ignored the dictates of O.C.G.A. § 43-34-20(3) and O.C.G.A. § 20-3-513. This error necessitates correction by this Honorable Court, so that prior holdings of this Court and the sovereign law of Georgia are not emasculated.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS' DISAVOWAL OF EXPLICIT STATE LAW AND POLICY WHICH WOULD SUBJECT HEALTH CARE PROVIDERS TO ANTITRUST SCRUTINY BECAUSE SUCH DISAVOWAL IS INCONSISTENT WITH THE CORE FEDERALISM CONCERNS WHICH ARE THE LINCHPIN OF THE ANTITRUST "STATE ACTION" DOCTRINE.

Recent cases from this Court, most notably *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 112 S. Ct. 2169, 199 L. Ed. 2d 410 (1992) teach that analysis of the "state action" doctrine and the core concern of federalism which underlies that Doctrine should not be used to elevate state regulations intended to serve limited ends over essential national policies that are designed to promote competition. *Id.* at 424. Thus, this Court has insisted on real compliance with both parts of the *Midcal* test. *Id.*

This case for which certiorari is sought is even more compelling than *Ticor* because the Eleventh Circuit has totally ignored the Georgia policy embodied in its Constitution and statutes and has turned federalism into so much political pablum.

It virtually eliminates the concept of federalism which has driven this Court's "state action" analysis of the federal anti-trust statutes.

A. The Eleventh Circuit Held That Under Georgia Law The Legislature Would Ignore The Georgia Constitution And Authorize The Combination In Restraint Of Trade Among Competing Physicians As Challenged In The Complaint.

1. Georgia Law Reflecting Its Sovereign Policy

Georgia is one of the few, if not the only state, that in its State Constitution proscribes anti-competitive conduct. Expression of public policy is found in Art. III, Sec. VI, Par. V of the Constitution of Georgia, 1983, with provides:

> (c) the General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void.

It is against this constitutional framework that the Georgia statutory scheme must be analyzed.

The general statutory scheme creating the power of the Hospital Authority is found in O.C.G.A. § 31-7-70, *et seq*. A fair reading of that section reveals that the Georgia Legislature conferred no greater powers on the Authority than they do on a private business corporation. O.C.G.A. § 31-7-75(18). The specific intent of the General Assembly was to "provide a mechanism for the operation and maintenance of needed health care facilities" in Georgia. O.C.G.A. § 31-7-76(a). This is hardly

evidence of an intent to permit the displacement or elimination of competition by private physicians against their competitors or by M.D.'s against D.O.'s.

The legislative scheme instead evidences a determined effort to treat M.D.'s and D.O.'s as equals with similar education and training. Thus, if a physician holds either an M.D. or D.O. degree, that person is considered a Doctor of Medicine licensed to practice in Georgia. O.C.G.A. § 43-34-20(3).

Georgia, in order to insure that sufficient qualified Doctors of Medicine return to Georgia to practice their profession, does not distinguish between four year medical schools which are accredited by either the American Medical Association or the American Osteopathic Association. The legislation specifically recognizes that the purpose of any such medical school, so accredited, is to provide for a medical education that is "designed to qualify the graduate for licensure by the Composite State Board of Medical Examiners of Georgia." O.C.G.A. § 20-3-512(a). The disbursement of funds does not depend on whether the medical school is allopathic or osteopathic, but whether it is located in the United States. O.C.G.A. § 20-3-513.

The purpose of this legislation was to encourage medical students from Georgia to return and practice their profession in the more sparsely populated areas, thereby affording adequate medical care to the entire population. O.C.G.A. § 20-3-518. It does not permit, authorize or encourage a distinction between M.D.'s and D.O.'s. It does not permit, authorize, or encourage larger hospitals to limit access to M.D.'s, while consigning D.O.'s to practice in smaller rural hospitals, thereby limiting competition.

This consistency with the Georgia Constitution is further reflected in the fact that Georgia does not have separate boards

of medical examiners or licensing exams for M.D.'s and D.O.'s There is one Composite Board that administers one composite exam to all applicants for licensure in Georgia. O.C.G.A. § 43-34-21. Any osteopathic physician licensed since the creation of the Composite Board on March 16, 1970, has a full license which permits the physician to practice surgery, and thus, is considered the equivalent of the M.D. in terms of qualifications. O.C.G.A. § 43-34-26(c). Georgia effectively eliminated the right of a hospital to refuse to permit a physician to perform surgery, simply because that physician was trained as and holds a D.O. degree. This philosophy is reflected in the Rules and Regulations of the Georgia Department of Human Resources dealing with hospitals. A "physician" is recognized to be any person who is licensed to practice in Georgia by the Composite Board. Chpt. 290-5-6-.02(1).

The Regulations provide that the governing body, (which in this case is the Authority) "shall establish policies to insure professional staff judgment in all matters necessary for the health and safety of the patients." Chpt. 295-5-6-.01(4). The term "professional staff" means those practitioners who comprise the medical staff and provide professional services to patients. Chpt. 290-5-5-.02(r). A "practitioner" is specifically defined to be a "Physician, Dentist, or Osteopathic Physician." Chpt. 290-5-6-.02(k). The redundancy that occurs in the definition of "Physician" and "practitioner" emphasizes that the use of M.D. or D.O. is a distinction without a difference.

The statutory scheme of Georgia does not show any clear indication that the Legislature intended to permit any governing body to restrict or eliminate competition or that such a result was foreseeable. It does not permit each of the Appellees to engage in an agreement which lessened competition nor to engage in economic credentialling.

2. The Georgia Supreme Court Has Held That Anticompetitive Enactments Of The Legislature Are Unconstitutional.

The Court of Appeals ignored the most recent pronouncements of the Georgia Supreme Court in concluding that the statutory scheme evidenced a legislative intent to supplant competition. The court in *Jackson and Coker, Inc. v. Hart,* 261 Ga. 371, 405 S.E. 2d 253, 254 (1991) declared an Act unconstitutional that authorized the granting of injunctive relief on restrictive covenants. It stated:

> We hold that the Act is beyond the power of the General Assembly inasmuch as it is one that authorizes contracts and agreements which may have the effect of or which are intended to have the effect of defeating or lessening competition or encouraging monopoly.

The court concluded at 255:

> Because the General Assembly is expressly prohibited by our Constitution from authorizing any contract that is violative of the constitutional provision, this purported Act of authorization is "unlawful and void."

Accord Rooney v. Jackson & Coker, Inc., 261 Ga. 533, 409 S.E. 2d 522 (1991).[3]

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3. The Opinion cited *Ferrero v. Associated Materials, Inc.,* 923 F.2d 1441 (11th Cir., 1991) as reaching a contrary result. (Pet. App. 44a). This case was decided on February 1, 1991. The Georgia Supreme Court Opinions were decided on June 27, 1991 and September 5, 1991, respectively. Thus, to the extent *Ferrero* had any applicability, its interpretation of the applicable provision of the Georgia Constitution has been rejected. Judge Birch's dissenting opinion at *Id.* 1449-1454 was proven to be correct.

The Georgia statutory scheme prohibits anticompetitive discrimination against competing osteopathic surgeons whose participation in the marketplace has been expressly licensed and financially supported by the state. The Court of Appeals chose to ignore those statutory provisions and based its conclusions that Georgia chose to displace competition by a selective culling of the entire statutory scheme. A fair reading of this Court's decisions on "state action" does not support a Chinese menu approach to analyzing a state statutory scheme by selecting part from Column A and a part from Column B and reaching a conclusion based on such a fragmented analysis.

The Complaint filed by Petitioner alleged and the record in the District Court and the Court of Appeals demonstrated that the Respondents combined solely to limit competition and to protect their incomes. Petitioner presented a detailed analysis by a respected and highly qualified health care economist who analyzed the relevant service, product and geographical market that existed in Lowndes County, Georgia and concluded respondents had the power to raise prices and limit competition for health care services, including orthopedic surgery in the relevant market area.

This evidence was not contradicted. Therefore, in order to ignore this evidence the Court of Appeals had to conclude that the Hospital Authority was an instrumentality of the state. (Pet. App. 21a). This is not what the Georgia Supreme Court concluded in *Thomas v. Hospital Authority of Clarke County,* 264 Ga. 40, 440 S.E. 2d 195, 196 (1994). Authorities are not the state or a department or agency of the state. The court concluded that it is irrelevant that the hospital authority is created by the county (which itself is the instrumentality or agency of the state) because the authority is a separate corporate entity. As the court noted at page 196:

> [I]t is clear that a hospital authority is not only not the state, it is also not the county or a part of the county.

The court specifically recognized that a public hospital will compete with a private hospital for patients. *Id.* at 197:

> If an instrumentality of the government chooses to enter an area of business ordinarily carried on by private enterprise, i.e., engage in a function that is not "governmental", there is no reason why it should not be charged with the same responsibilities and liabilities borne by a private corporation. Nor is there any reason why those individuals who do business with that instrumentality should be accorded less protection than they would have in a facility run by a private corporation.

The fact remains that Georgia does not give any special recognition to the conduct of a hospital, if it is a public hospital such as respondent. At least in Georgia, a public hospital has to play by the same rules as every other hospital. Respondents have never contended that every hospital in Georgia is protected under the state action doctrine.

The court below attempted to limit the holding of *Thomas* to an issue involving sovereign immunity. It ignored the clear language at page 196 that stated:

> In earlier cases, we have applied a narrow definition in determining what constitutes the state or a political division thereof, distinguishing the state and its political

subdivisions from instrumentalities created by the state to carry out various functions. The Court of Appeals followed this analysis in *Richmond County Hospital Auth. v. McLain,* 112 Ga.App. 209, 144 S.E.2d 565 (1965). In that case, the Court noted that there is a clear distinction between a political subdivision such as a county and a corporate body such as a hospital authority, which is a creation of the county. Statutes such as those providing for hospital authorities are intended to allow a county to create public agencies having a corporate entity, so as to contract with the county, but without those powers which "are generally inherent in the concept of a political subdivision." Accordingly, the Court of Appeals held that "neither the language of [the code section] which refers to a hospital authority as a 'body corporate and politic' nor that which assigns to it 'public and essential governmental functions' is sufficient to constitute it a political division of the State," 112 Ga.App. at 211-12, 144 S.E.2d 565, and this holding met with the approval of this Court in *Bradfield v. Hosp. Authority of Muscogee County,* 226 Ga. 575, 587, 176 S.E.2d 92 (1970). Further, it is irrelevant that the hospital authority is an instrumentality created by a department or agency of the state, i.e., the county. . . . If an instrumentality of the government chooses to enter an area of business ordinarily carried on by private enterprise, i.e., engage in a function that is not "governmental," there is

> no reason why it should not be charged with the same responsibilities and liabilities borne by a private corporation. Nor is there any reason why those individuals who do business with that instrumentality should be accorded less protection than they would have in a facility run by a private corporation.

The Eleventh Circuit, however, fixated on the fact that the issue in the case was whether sovereign immunity extended to a hospital authority. The Court of Appeals concluded that "state action" immunity for antitrust purposes is different. (Pet. App. 19a). Such immunity is merely a part of sovereign immunity and is a distinction without a difference. The Supreme Court in *Thomas* in footnote 6 alluded to this at page 197 by expressly holding that the function of a hospital is not a governmental function and implicitly suggesting that the hospital is a market participant.[4]

The attempt by Court of Appeals to elevate the respondent authority to the equivalent of a state or municipal entity is not authorized or consonant with Georgia law. However, to attempt to avoid the impact of this Court's decision in *Ticor, Patrick* and *Midcal* it was necessary that the doctrine of federalism be ignored.

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4. The Court of Appeals relied on *Martin v. Hospital Authority of Clarke County*, 264 Ga. 626, 449 S.E. 2d 877 (1994) because it was decided after *Thomas* as supporting its conclusion that *Thomas* was a limited decision (Pet. App. 18a). The most that can be said for *Martin* is that it holds that a hospital authority as a governmental entity can not be liable for punitive damages but that the individual tort-feasors may be because in that manner the twin purposes of punitive damages — punishment and deterrence — could be effectuated. *Id.* at 828. There is absolutely no language limiting the Court's holding in *Thomas, supra.*

This rejection of the applicability of the Georgia Constitution to the present case was to permit a federal statute and judicial doctrine to nullify the clearly stated fundamental laws of a sovereign state where policy is broader than the scope of the federal antitrust laws. This philosophical conundrum was first discussed by Professors Areeda and Turner in their treatise on antitrust law found at 1 Areeda & Turner, *Antitrust Law* (1978 Ed.), paragraph 208 at pages 58 and 59 where they stated:

> Where state law prohibits the same, or less than the federal antitrust laws, there is, therefore, no general difficulty in giving effect to the state's commands. However, where state law forbids more than federal law — which is not the usual situation — the problem is more subtle. The general answer is that such a state law remains consistent with federal law, and is not preempted. The fact that federal law tolerates certain conduct does not necessarily mean that there is an affirmative federal policy encouraging such conduct.

Under this view, the respondents can derive no benefit or immunity from either the LGAA or state action doctrine. The federal "state action" exemption and the LGAA are designed to limit federal intrusion into state regulatory decision making, not to limit a state's definition of the powers or liabilities of municipalities which are creatures of the state. T. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism,* 75 Cal. L.R. 227 (1987), Areeda & Hovenkamp, *Antitrust Law* (1993 Supp.) paragraph 212.2 at page 138. Adoption of the view espoused by the court below would transform a device created to protect state policy into a tool to undermine state policy and would be a perversion of the policy

of federalism that underlies both rules. *AT&T v. North American Industries,* 873 F. Supp. 810, 813 (S.D.N.Y. 1992).

II.

THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS STATE ACTION HOLDINGS REGARDING THE ANTITRUST IMMUNITY OF PRIVATE COMPETITORS BECAUSE IT CONFLICTS WITH THIS COURT'S DECISIONS IN *TICOR, PATRICK* AND *CITY OF LAFAYETTE* AS WELL AS DECISIONS IN THE NINTH CIRCUIT.

The Court of Appeals by concluding that the Respondent Authority was the equivalent of the State for supervisory purposes has effectively eliminated the "Active State Supervision" requirement of this Court's decision in *Ticor, Patrick,* and *City of Lafayette.* (Pet. App. 22a). The court below relying on this Court's decision in *City of Columbia v. Omni Outdoor Advertising,* 499 U.S. 365, 377-78, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991) misread that decision as absolutely foreclosing any inquiry into a private actor's motive. (Pet. App. 27a). The court below concluded that this opinion mandates that the state action doctrine is applicable to every respondent including the private doctor respondents. (Pet. App. 29-30a). This view completely misapprehends the holding in *Omni.*

Significantly, this Court's holding in *Omni* was limited to municipal regulatory activity that necessarily displaced competition. Where the authority granted by the state is to participate in an otherwise competitive market, however, no such presumption of anticompetitive state policy exists.[5]

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5. Indeed Mr. Justice Scalia who was the author of the majority opinion

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The Ninth Circuit has adopted a similar view in *Lancaster County Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991) by holding that similar statutory language in California to that relied on by the court below cannot be said to evidence a clearly articulated state policy authorizing anti-competitive activity in the selection of medical staff.

A. The Anti-Competitive Proprietary Motives Of Individual Respondents Are Necessarily Relevant To State Action Analysis.

The Court of Appeals glossed over and basically ignored this Court's holdings in *Patrick* and *Ticor* by concluding that they have no applicability since the court found that the authority could supervise itself as well as the physicians who were engaged in their decisions, and therefore there was a clear articulation. (Pet. App. 33a). The court below is inconsistent. In one part of its opinion it is claiming that there is active supervision. (Pet. App. 34a). At a later part it claims that the active supervision requirement has no bearing on this case and need not be discussed. (Pet. App. 36a).

Any analysis of the conduct of physicians in staff credentialling matters must start with *Patrick v. Burget*, 486 U.S. 94, 108 S. Ct. 1658, 100 L. Ed. 83 (1988), *rehearing denied*, 101 L. Ed. 2d 952 (1988) where the issue was whether the state action doctrine protects physicians from federal antitrust liability for their activities on state mandated peer review committees, 486 U.S. 95-97. The unanimous Supreme Court never reached the "clear articulation" prong of the standard set forth in *California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc.*,

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in *Omni* noted in his concurrence in *Ticor, supra*, at 427 his skepticism about "the *Parker v. Brown* exemption for state-programmed private collusion in the first place."

445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980) (*"Midcal"*) because the "active supervision" requirement of *Midcal* was not met. 486 U.S. at 100.

Active supervision by the state of the conduct of purely private actors is to prevent a private party, who engages in anticompetitive conduct pursuant to a clearly articulated state policy, from furthering only his or her own interests rather than the governmental interests. *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985). This will ensure that the doctrine will shelter only those acts that actually further the state policy. *Id.* at 46-47. Thus, the sole purpose of requiring a program of state supervision is to realistically ensure that a private actor's anticompetitive conduct promotes state policy, rather than merely that party's individual interests. *Patrick v. Burget, supra* at 101. Georgia, like Oregon, has not established a state program of active supervision over the conduct of private parties engaged in hospital staff membership or credentialling decisions.

It was the thesis of the court below, that once the first prong of the *Midcal* test is satisfied by finding that there is a clear articulation, any private physician acting pursuant to that articulation enjoys complete immunity. This thesis was rejected in *Ticor*. The court held at 199 L. Ed. 2d 424:

> In the usual case, *Midcal's* requirement that the State articulate a clear policy shows little more than that State has not acted through inadvertence; it cannot alone ensure, that particular anticompetitive conduct has been approved by the State. . . . For states whose object it is to benefit their citizens through regulation, a broad doctrine of state-action immunity may serve as nothing more than

> an attractive nuisance in the economic sphere. To oppose these pressures, sole reliance on the requirement of clear articulation could become a rather meaningless formal constraint.

The court makes clear that private actors are not relieved from liability under the state action doctrine, unless their conduct is actively supervised by the state.

The rationale is that while a state may very well provide for peer review by physicians, such provision does not constitute approval of anticompetitive conduct by them. *Id.* The court concluded that without "active supervision in fact, there can be no state action immunity for what were otherwise private price fixing arrangements." *Id.* at 424. This concept was the result of the doctrine of federalism. The court reiterated that state action immunity is disfavored. *Id.* at 424.

The evidence in this case clearly pointed to anticompetitive conduct resulting in higher prices to consumers, division of markets and what essentially is price fixing. This type of anticompetitive conduct by private actors persuaded the *Ticor* majority that *Midcal* must be followed. It stated at 199 L. Ed. 2d 424:

> States must accept political responsibility for actions they intend to undertake. It is quite a different matter, however, for federal law to compel a result that the States do not intend but for which they are held to account. Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national

> policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

The respondents in *Ticor,* like the court below, contended that the first prong of *Midcal* was sufficient if there was articulated a clear policy to displace the antitrust laws with the state's own form of economic regulation. This Court rejected this contention by stating "it misapprehends the close relation between *Midcal's* two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Id.* at 424.

The fact that the Respondent Authority, *arguendo,* may be acting pursuant to an articulated state policy of economic regulation, deference to it only confers state action immunity to the extent that the Authority has not unreasonably exercised the powers given to it by the state. *Independent Taxicab Drivers Employees v. Greater Houston Transportation Co.,* 760 F.2d 607, 611 (5th Cir. 1985). The fact that neither Respondents Creech, Aguero, nor Kendrick could meet the standards of the bylaws, at the time of the denial of Dr. Crosby's application, and yet were permitted to perform orthopedic procedures at Respondent Medical Center is simply a random enforcement of an anticompetitive policy. The Authority has displaced competition without any reasonable basis. *Santos v. City of Houston, Texas,* 852 F. Supp. 610, 617 (S.D. Tex., 1994) ("Arbitrary enforcement, without any recognizable benefit, is simply not a reasonable exercise of authority.")

B. Individual Competitors Who Are Separate Entities For Inter-Enterprise Analysis Are "Private" For State Action Analysis Requiring Them To Prove Active State Supervision Of Their Conduct.

The court below concluded that under its decisional law the respondents could conspire between and among themselves. (Pet. App. 42a). The court, however, concluded that since they were performing a peer review function the individual respondents were agents of the authority. (Pet. App. 48a). Since they were agents of the Authority they were performing their duties in response to a clearly articulated policy of the state and are immune from anti-trust liability. (Pet. App. 49a).

Aside from being a paradigm of circular reasoning, this view is erroneous because it equates the members of the Authority with state officials. There is nothing in the statutes or case law of Georgia that even remotely suggests that a Hospital Authority member appointed by a municipality is transformed into a state official. As noted, *supra*, O.C.G.A. § 31-7-15(a) must be carried out under the regulations and the supervision of the Department of Health. There is not a statute, case, or scintilla of evidence in the record that holds that the Department of Health ever promulgated a regulation or engaged in any supervision in this or any other case in Georgia of discriminatory peer review conduct.

Georgia's statutory requirement of regulations and supervision by the Department of Health renders the opinion below that supervision of peer review has been statutorily given to the Authority to be nothing more than a result driven effort to eliminate these cases from appearing on its docket. The challenged policy of respondents of credentialling discrimination is simply not consistent with any Georgia statute or rule but rather conflicts with all expressions of Georgia sovereign policy

as described above. As market participants,[6] the respondents efforts to eliminate competition from petitioner and other osteopathic physicians finds no support in Georgia law. The "peer review" in this case was not a review of petitioner's ability but, rather, was based solely on the fact that he had received osteopathic rather than allopathic training.

The Georgia statutory scheme does not establish a state program of active supervision over peer review decisions. This Court had earlier noted in *Hallie v. Eau Claire,* 471 U.S. 34, 45, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985) that: "A private party . . . may be presumed to be acting primarily on his or its own behalf." The active supervision requirement stemmed from this Court's observation in *Hallie, supra,* at 47, that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests rather than the governmental interests of his state." Thus, this Court in *Patrick v. Burget, supra*, at 100-101 required that there be active supervision by state officials over state mandated peer review.

The decision of the Eleventh Circuit, if left to stand, will effectively eliminate this Court's carefully crafted state action doctrine and will severely undermine, if not destroy, the concept of federalism.

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6. Despite the Eleventh Circuit's statement that "[t]he parties have not argued . . . a 'market participant' exception to state action immunity" Pet. App. for 14 at 20a, the court is simply wrong. Petitioner did argue both in its main and reply brief that under the market participant discussion in *Omni supra,* the respondents could get no relief from that decision. Petitioner will pursue that argument again in this Court if certiorari is granted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED SEPTEMBER 11, 1996

R. Derry CROSBY, Plaintiff-Appellant,

v.

HOSPITAL AUTHORITY OF VALDOSTA AND LOWNDES COUNTY, D/B/A South Georgia Medical Center, Earl L. Creech, M.D., John R. Kendrick, M.D., Oscar E. Aguero, M.D., Archie L. Griffin, et al., Defendants-Appellees.

No. 95-8187.

United States Court of Appeals
Eleventh Circuit.

Sept. 11, 1996.

* * *

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William Gus Elliott, Valdosta, GA, Joseph William Watkins, Sidney F. Wheeler, Jacquelyn D. Van Tuyl, Atlanta, GA, for Hospital Authority & Lowndes County.

Kevin E. Grady, Alston & Bird, Atlanta, GA, for Amicus Curiae — Ga. Hospital Association.

Joshua L. Prober, McCullough, Campbell & Lane, Chicago, Illinois, for Amicus Curiae — American Osteopathic Association.

Appendix A

Appeal from the United States District Court for the Middle District of Georgia.

Before ANDERSON and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

ANDERSON, Circuit Judge:

This case involves a doctor, R. Derry Crosby, who was denied staff privileges by the Hospital Authority of Valdosta and Lowndes County ("the Authority"). Dr. Crosby claimed that the Authority, its board members, and the individual doctors on hospital peer review committees (collectively "defendants") violated federal antitrust law when they denied his application for hospital privileges.[1] The district court granted defendants' motion for summary judgment on the ground that their actions were shielded by the doctrine of state action antitrust immunity. *Crosby v. Hospital Authority of Valdosta*, 873 F. Supp. 1568, 1581 (M.D. Ga. 1995). We affirm.

I. FACTS

Dr. Crosby graduated from West Virginia College of Osteopathy, an osteopathic medical school, where he earned a Doctor of Osteopathy ("D.O.") degree.[2] Upon completion of

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1. Dr. Crosby presented other state law claims which are not relevant to this appeal.

2. This case involves Crosby's claim that he was denied staff privileges because he was an osteopathic as opposed to an allopathic physician. We also have described the difference between the two as follows:

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medical school. Dr. Crosby completed a one year osteopathic internship at Memorial Hospital in York, Pennsylvania. He remained at Memorial Hospital for another four years to complete an osteopathic orthopedic surgical residency program.

On September 20, 1986, Dr. Crosby applied for orthopedic surgical staff privileges at South Georgia Medical Center ("SGMC") the hospital doing business for the Authority. After review by numerous committees and the Authority, his application was denied. Dr. Crosby contends that the doctors on the peer review committees which gave recommendations to the Authority and the Authority itself conspired to deprive him of staff privileges because he is not an allopathic doctor and as part of a conspiracy in restraint of trade in violation of 15 U.S.C.A. § 1, and monopolization (or an attempt to monopolize) in violation of 15 U.S.C.A. § 2.

The context of this case makes it necessary to review the creation of hospital authorities in Georgia and the peer review process at SGMC and the Authority. The Authority was created

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> Generally, osteopathy assists the body's remedial capabilities by focusing on the interaction of the biological systems and stressing musculoskeletal manipulative therapy, while allopathy treats disease by producing effects incompatible with the condition to be alleviated. . . . Although Georgia licenses both D.O.'s and M.D.'s to practice medicine, the state distinguishes between the two medical educations, referencing them separately in the licensing statutes. O.C.G.A. §§ 43-34-20(3), 43-34-26 (1984).

Silverstein v. Gwinnett Hosp. Authority, 861 F.2d 1560, 1563 (11th Cir. 1988).

pursuant to Georgia's Hospital Authorities Law, O.C.G.A. § 31-7-70 et seq. *See generally Cox Enterprises v. Carroll City/ County Hosp. Auth.*, 247 Ga. 39, 273 S.E. 2d 841, 844-45 (1981). Pursuant to the Hospital Authorities Law, the Georgia legislature "created in and for each county and municipal corporation of the state a public body corporate and politic to be known as the 'Hospital Authority' of such county or city. . . ." O.C.G.A. § 31-7-72(a). A hospital authority's board is appointed by the governing body of the county or municipal corporation in which it was created. *Id.* Hospital authority board members receive no compensation for their work, although they are permitted reimbursement for actual expenses. O.C.G.A. § 31-7-74(a). Hospital authorities are granted the same exemptions and exclusions from taxes as are granted to cities and counties for similar facilities. O.C.G.A. § 31-7-72(e).

A hospital authority is "deemed to exercise public and essential governmental functions and [has] all the powers necessary and convenient to carry out and effectuate the purposes and provisions of [the Hospital Authorities Law]." O.C.G.A. § 31-7-75. These powers include, in addition to those necessary to operate a hospital, the power to sue and be sued, to execute contracts, to exercise the right of eminent domain, to receive proceeds from the sale of general obligation or county bonds, and to issue revenue anticipation certificates or other evidence of indebtedness. *Id.* An authority may not operate for profit, but rather, must adjust its prices to produce only enough revenue to cover costs with reasonable reserves. O.C.G.A. § 31-7-77. Hospital authorities are authorized to sell "negotiable revenue anticipation certificates" for the purpose of funding their activities. O.C.G.A. §§ 31-7-75(16), 31-7-78. These certificates, however, are not a debt of the city, the county, the State, or any political subdivision. O.C.G.A. § 31-7-79. Although not a debt of any "political subdivision," these

certificates "are declared to be issued for an essential public and governmental purpose and together with interest thereon and income therefrom, [are] exempt from all taxes." O.C.G.A. § 31-7-79. Although an authority does not have the power to tax, counties and cities possess the power to levy an ad valorem tax for the purpose of contracting with the authority for the provision of specific services. O.C.G.A. § 31-7-84(a). Indeed, counties and their component municipalities are specifically authorized to contract with hospital authorities for the purpose of providing medical care to indigent residents of that county or municipality. O.C.G.A. § 31-7-85. Upon dissolution, a hospital authority is not authorized, in the absence of other specific legislation, to convey any of its property to a private person, association, or corporation. O.C.G.A. § 31-7-89. Finally, the board of trustees of each authority is required to file with the governing body of the particular municipality an annual report of its activities. O.C.G.A. § 31-7-90.

Dr. Crosby's application for staff privileges was governed by the bylaws of SGMC's medical staff (the "Bylaws").[3] In particular, Article X, § 2(b)(4) sets forth educational and other related requirements for orthopedic surgeons applying for staff privileges: "Physicians applying for Staff Membership in the specialty of Orthopedics must demonstrate by training, experience, and performance the requirements for eligibility in the specialty as designated by the American Board of Orthopedics and be either board certified or board eligible." (Bylaws, Art. X, § 2(b)(4)).

Pursuant to the Bylaws, Dr. Crosby's application for staff

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3. All members of the medical staff agreed to abide by the Bylaws. Further, the Bylaws were adopted and approved by the Authority.

privileges was reviewed by the following committees of the medical staff: (1) the Orthopedic Service of the Department of Surgery; (2) the Credentials Committee; (3) the Executive Committee; and (4) the Ad Hoc Hearing Committee. The Orthopedic Service recommended denial of Dr. Crosby's application because he did not have the background (i.e., training, experience, and performance) required by the Bylaws.[4] In addition, the Orthopedic Service stated that its decision was based on its determination that there were a sufficient number of orthopedic surgeons already on the hospital staff. Next, the Credentials Committee recommended denial of Dr. Crosby's application for failure to comply with the Bylaws' orthopedic residency requirements.[5] The Executive Committee reviewed the Credentials Committee's denial and affirmed its conclusion. The Ad Hoc Hearing Committee then conducted a hearing and concluded that the recommendation of the Executive Committee was appropriate. Pursuant to the Bylaws, the application was referred back to the Executive Committee, which voted to uphold the Ad Hoc Hearing Committee's recommendation of denial on the grounds that Dr. Crosby failed to meet the criteria established by the Bylaws.

Finally, the Authority, acting through its Appellate Review

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4. Specifically, Dr. Crosby was not "board certified or board eligible" as designated by the American Board of Orthopedics ("ABO") because he had not completed an osteopathic orthopedic residency training program that was approved by the ABO. Accordingly, the Orthopedic Service concluded, in part, that Dr. Crosby did not satisfy the Bylaws' residency requirements.

5. In other words, the recommendation of the Credentials Committee dropped the Orthopedic Service's second ground for denying Dr. Crosby's application.

Committee, conducted a thorough hearing[6] during which it considered Dr. Crosby's application in light of the recommended denial by the staff committees.[7] As a result of this hearing, the Authority unanimously voted to deny Dr. Crosby's application. It stated its grounds for this denial as follows:

> (1) The medical staff of South Georgia Medical Center, through its Executive Committee, has found that the applicant has not demonstrated by training, experience and performance the requirements for eligibility in the specialty of orthopedics.
>
> (2) The applicant has not met the "burden" placed on him by Article V, § 1, b of the Medical Staff Bylaws of South Georgia Medical Center.
>
> (3) The applicant fails to meet the requirements of Article X, § 2, b. — Surgical Service, 4., in that he has not demonstrated that he is either Board Certified or Board Eligible by the American Board of Orthopedics.

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6. Dr. Crosby was represented by counsel at this hearing.

7. Under the bylaws, although the various staff committees provide recommendations to the Authority, the Authority wields ultimate decisionmaking power over staff credentialing decisions. (Bylaws, Article V, § 2). In this regard, the Authority exercises meaningful control over the ultimate decision. It has the power to follow, modify, or even disregard staff committee recommendations. (*Id.* at Article V, § 2(g)-(j)).

Thereafter, on March 14, 1990, Dr. Crosby filed the present action against three groups of defendants: 1) the Authority, d/b/a South Georgia Medical Center; 2) the board members of the Authority; and 3) the physicians who participated in the various review committees. He alleged violations of federal antitrust law (restraint of trade and monopolization) and Georgia law.[8]

The district court, in a well-reasoned opinion, granted summary judgment, holding that all defendants were immune from suit by virtue of state action immunity under *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), and its progeny. *Crosby*, 873 F. Supp. at 1580-81. The Authority and its members, it reasoned, were a "political subdivision" of the State of Georgia had clearly articulated a policy authorizing the challenged anticompetitive conduct. *Id.* at 1575-81. Further, it found that the individual staff members on peer review committees, because they acted as the Authority's agents, were protected by the Authority's state action immunity. *Id.* at 1576-77. Finally, the court held that, even if defendants were not entitled to state action immunity, they were immune from damages under the Local Government Antitrust Act ("LGAA"), 15 U.S.C.A. §§ 35-36, and the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C.A. §§ 11101-11152. *Crosby*, 873 F. Supp. at 1581-84. On appeal, Dr. Crosby challenges each of these determinations.[9]

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8. By consent of parties, Dr. Crosby abandoned all but his federal antitrust claims. *Crosby*, 873 F. Supp. at 1570.

9. Because we affirm the district court's ruling with respect to state action immunity and immunity from damages under the LGAA, we need not reach its decision regarding immunity under the HCQIA.

II. DISCUSSION

A. *State Action Immunity*

We review *de novo* the district court's grant of summary judgment to defendants on their state action immunity defense. *FTC v. Hospital Board of Directors of Lee County,* 38 F.3d 1184, 1187 (11th Cir. 1994) (citation omitted); *Bolt v. Halifax Hosp. Medical Ctr.* ("*Bolt IV*"), 980 F.2d 1381, 1384 (11th Cir. 1993). Under the state action immunity doctrine, also known as the *Parker* doctrine, states are immune from federal antitrust law for their actions as sovereign. *Parker v. Brown,* 317 U.S. 341, 351-53, 63 S. Ct. 307, 314, 87 L. Ed. 315 (1943); *Lee County,* 38 F.3d at 1187. The doctrine is grounded in and derived from principles of federalism and state sovereignity. *Parker,* 317 U.S. at 350-52, 63 S. Ct. at 313-14.

The state action immunity doctrine "does not apply *directly* to a state's political subdivisions because these subdivisions 'are not themselves sovereign; they do not receive all the federal deference of the States that create them.' " *Lee County,* 38 F.3d at 1187 (quoting *City of Lafayette, La. v. Louisiana Power & Light Co.,* 435 U.S. 389, 412, 98 S. Ct. 1123, 1136, 55 L. Ed. 2d 364 (1978)). Accordingly, actions by the State and actions by municipalities are evaluated under different standards. The *Parker* doctrine "exempts . . . anticompetitive conduct engaged in as an act of government by the State as sovereign, or by its subdivisions pursuant to state policy to displace competition with regulation or monopoly public service." *City of Lafayette,* 435 U.S. at 413, 98 S. Ct. at 1137 (Brennan, J., plurality opinion). The extension of *Parker* immunity to political subdivisions reflects the Court's conclusion that because "[m]unicipal corporations are instrumentalities of the State for

the convenient administration of government within their limits, [cit.], the actions of municipalities may reflect state policy." *Id.* (citation omitted).

Accordingly, the Court has made clear that a municipality[10] is entitled to state action immunity if it acted pursuant to "clearly articulated and affirmatively expressed state policy." *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 46-47, 105 S. Ct. 1713, 1720, 85 L. Ed. 2d 24 (1985); *City of Lafayette,* 435 U.S. at 410, 98 S. Ct. at 1135; *see also Bolt IV,* 980 F.2d at 1385-86.[11] Private parties are entitled to even less federal deference than either the State or its political subdivisions. When a private party seeks the protection of state action immunity, it

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10. We use the terms "municipality" and "political subdivision" interchangeably throughout this opinion. *Cf. Askew v. DCH Regional Health Care Authority,* 995 F.2d 1033, 1037 (11th Cir.), *cert. denied,* 510 U.S. 1012, 114 S. Ct. 603, 126 L. Ed. 2d 568 (1993) ("Ordinarily, when a local government entity seeks immunity from antitrust liability, it must show that it is a political subdivision of the state and that the challenged conduct is authorized under a 'clearly articulated and affirmatively expressed policy of the state.' "); *Bolt IV,* 980 F.2d at 1385 ("Political subdivisions, including municipalities, . . . can obtain protection under the state-action immunity doctrine if they can 'demonstrate that [they acted pursuant to a clearly articulated stated policy displacing competition with regulation].' ").

11. In *City of Lafayette,* the Court suggested that state action immunity would apply to a municipality only if: (1) the municipality acted pursuant to clearly articulated and affirmatively expressed state policy; and (2) the anticompetitive conduct was actively supervised by the State. 435 U.S. at 410, 98 S. Ct. at 1135. In *Town of Hallie,* the Court held that only the first of the these two prongs applies to municipalities. 471 U.S. at 46-47, 105 S. Ct. at 1720. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105, 100 S. Ct. 937, 943, 63 L. Ed. 2d 233 (1980), the Court held that both prongs apply to private parties.

must show both that: (1) the challenged restraint was clearly articulated and affirmatively expressed as state policy; and (2) the policy was actively supervised by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S. Ct. 937, 943, 63 L. Ed. 2d 233 (1980). In *Town of Hallie*, the Court explained that the second prong of the *Midcal* test, the active state supervision requirement, is unnecessary when the actor is a municipality because whereas there is a real danger that a private party acts to further his or her own interest rather than the governmental interests of the State, there is less danger that a municipality is involved in a *private* price-fixing arrangement. 471 U.S. at 47, 105 S. Ct. at 1720. Although there is some danger that a municipality will pursue its own goals rather than those of the State,[12] this concern is addressed by the first prong of the *Parker* doctrine, i.e., the municipality must act pursuant to clearly articulated state policy.

In sum, a greater level of state involvement in the anticompetitive conduct must be demonstrated if the defendant is a private party rather than a political subdivision. If the defendant is a "political subdivision," it travels under the single-prong *Town of Hallie* test (i.e., the defendant must show "clear articulation"). If the defendant is a private party, it travels under the two-prong *Midcal* test (i.e., defendant must show both "clear articulation" and "active state supervision"). Accordingly, we must determine whether the Authority, its board members and

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12. *Cf. City of Lafayette*, 435 U.S. at 412-13, 98 S. Ct. at 1136-37 ("In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.").

SGMC's staff members should be evaluated as a political subdivision or as private actors.

B. *Political Subdivision or Private Actors?*

1. *The Authority and its Board Members*

The district court found that the Authority is a political subdivision of Georgia. It based its decision on several cases involving similar issues in Alabama and Florida. *See FTC v. Hosp. Board of Directors of Lee County,* 38 F.3d 1184 (11th Cir. 1994); *Askew v. DCH Reg. Health Care Authority,* 995 F.2d 1033 (11th Cir.), *cert. denied,* 510 U.S. 1012, 114 S. Ct. 603, 126 L. Ed. 2d 568 (1993); *Todorov v. DCH Healthcare Authority,* 921 F.2d 1438 (11th Cir. 1991); *see also Sweeney v. Athens Regional Medical Center,* 705 F. Supp. 1556, 1565 (M.D. Ga. 1989) (interpreting Georgia statute).

In determining whether the Authority is a "political subdivision" for purposes of state action immunity, we are guided by *Town of Hallie,* 471 U.S. at 46-47, 105 S. Ct. at 1720. There, the Court held that municipalities, and perhaps state agencies, need not satisfy the active state supervision requirement. *Id.* It based its conclusion on the realization that states often act through their municipalities and, accordingly, action by a municipality often is equivalent to action by the State as sovereign.

> Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interest, rather than the governmental interests of the

> State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Id. at 47, 105 S. Ct. at 1720. The Court discounted the importance of active supervision in the context of examining a political subdivision's actions, noting that the "requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Id.* at 46, 105 S. Ct. at 1720. Such evidence is not necessary where a political subdivision, a creation and arm of the State, acts pursuant to clearly articulated state policy. *See Hass v. Oregon State Bar,* 883 F.2d 1453, 1461 (9th Cir. 1989), *cert. denied,* 494 U.S. 1081, 110 S. Ct. 1812, 108 L. Ed. 2d 942 (1990).

We have held that state hospital authorities can be political subdivisions for purposes of state action immunity. *See, e.g., Askew,* 995 F.2d at 1037-38. Of course, this does not end the inquiry; in each case we must examine the State's statutes to determine whether the actor is a "political subdivision," i.e., whether imposition of the active state supervision requirement

is necessary to determine whether the challenged actions are those of the State as sovereign.[13]

The Authority was created pursuant to O.C.G.A. § 31-7-72 which provides, in relevant part:

> (a) There is created in and for each county and municipal corporation of the state a public body corporate and politic to be known as the "hospital authority" of such county or city, which shall consist of a board of not less than five nor more than nine members to be appointed by the governing body of the county or municipal corporation of the area of operation for staggered terms as specified by resolution of the governing body. . . .
>
> (e) Nothing in this Code section is intended to invalidate any of the acts of existing boards or authorities. Hospital authorities shall be granted the same exemptions and exclusions from taxes as are now granted to

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13. Appellees cite a number of factually-distinguishable cases for the proposition that "hospital authorities" in general are political subdivisions. In *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir. 1991) and *Askew, supra*, for example, we examined hospital authorities created by the Alabama Health Care Authorities Act. This Act specifically provided that Alabama's hospital authorities acted as political subdivisions of the State when exercising their powers, even if such exercise violated federal antitrust law. These cases are not dispositive because Georgia's statutes are not nearly so explicit.

> cities and counties for the operation of facilities similar to facilities to be operated by hospital authorities as provided for under this Title.

Further, O.C.G.A. § 31-7-75 provides, in relevant part:

> Every hospital authority shall be deemed to exercise public and essential governmental functions and shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Article.

The Authority concludes from this language that, because hospital authorities are public bodies, they also must be political subdivisions of the State for purposes of *Parker* immunity. *See FTC v. Hospital Board of Directors of Lee County,* 38 F.3d 1184, 1188 (11th Cir. 1994) (concluding that a health care authority was a "political subdivision" subject to the single-prong test because it was a special purpose unit of local government).

Dr. Crosby argues that the Georgia Supreme Court has conclusively determined that Georgia hospital authorities are not "political subdivisions" for purposes of state action immunity. *See Thomas v. Hospital Authority,* 264 Ga. 40, 440 S.E.2d 195 (1994). In *Thomas,* the court examined whether a hospital authority in Georgia was entitled to sovereign immunity from an action arising out of a slip and fall injury. The court examined Art. I, § 2, ¶ 9(e) of the Georgia Constitution, which provides, in relevant part: "Sovereign immunity extends to the state and all of its departments and agencies." The court held that "hospital authorities, because they are neither the State nor

a department or agency of the State, are not entitled to the defense of sovereign immunity." *Thomas,* 440 S.E.2d at 196. The court unambiguously stated that "neither the language of [the code section] which refers to a hospital authority as a 'body corporate and politic,' nor that which assigns to it 'public and essential governmental functions' is sufficient to constitute it a political subdivision of the state. . . ." *Id.* (quotation omitted). The court concluded that the hospital authority was not a "political subdivision": "[T]here is a clear distinction between a political subdivision such as a county and a corporate body such as a hospital authority, which is a creation of the county." *Id.*

Thomas indicates that Georgia does not consider its hospital authorities to be "political subdivisions" for purposes of sovereign immunity under the Georgia Constitution. In *Thomas,* the court supported its conclusion by reference to the public policy underlying sovereign immunity in Georgia. *Id.,* 440 S.E.2d at 196-97. It found that a hospital authority's functions are not the type of conduct Georgia's doctrine of sovereign immunity was designed to protect. Sovereign immunity was intended to protect the government from lawsuits as it goes about the business of governing. *Id.* By contrast,

> [t]he operation of a hospital is not the kind of function, governmental or otherwise, entitled to the protection of sovereign immunity. The very functions performed by the Hospital Authority are performed by private hospitals and the Hospital Authority is in direct competition with these private hospitals for patients.[ ] If an instrumentality of the government chooses to enter an area

> of business ordinarily carried on by private enterprise, i.e., engage in a function that is not "governmental." there is no reason why it should not be charged with the same responsibilities and liabilities borne by a private corporation.

Id., 440 S.E.2d at 197.

We recognize that the decision to "authorize" anticompetitive conduct is wisely left to the State. *See FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 636, 112 S. Ct. 2169, 2178, 119 L. Ed. 2d 410 (1992) (emphasizing that careful application of state action immunity doctrine insures that the State remains responsible "for the price fixing it has sanctioned and undertaken to control"). However, the definition of "political subdivisions" for purposes of state sovereign immunity does not control its definition for purposes of antitrust state action immunity. As directed by *Town of Hallie*, 471 U.S. at 46-47, 105 S. Ct. at 1720, we focus instead on whether the nexus between the State and the Authority is sufficiently strong that there is little real danger that the Authority is involved in a *private* price-fixing arrangement. *See id.*

Georgia public purpose authorities are unique entities, lying somewhere between a local, general-purpose governing body (such as a city or county) and a corporation. *See generally* Paul W. Bonapfel, "The Legal Nature of Public Purpose Authorities: Governmental, Private or Neither?" 8 Ga. L. Rev. 680 (1974) ("An authority is [typically] an entity possessing both corporate and governmental characteristics and created by general purpose governments to accomplish specific purposes. . . ."). Indeed,

although Georgia's hospital authorities possess many of the attributes of a sovereign, they are clearly limited in their character and are private actors in many respects.

In *Thomas,* the court focused on the fact that hospital authorities have a separate existence form the State, i.e., they are an instrumentality created by the State and county for a special purpose. In other contexts, however, the Georgia Supreme Court has recognized that hospital authorities are governmental entities. For example, in *Martin v. Hospital Authority of Clarke County,* 264 Ga. 626, 449 S.E.2d 827, 828 (1994), a case decided after *Thomas,* the Georgia Supreme Court held that hospital authorities are not liable for punitive damages because they are "governmental entit[ies]." Indeed, the fact that hospital authorities are governmental entities is demonstrated by the statutes creating and regulating them. The Georgia Supreme Court has summarized those factors illustrating the Authority's governmental nature:

> Factors tending to establish the Authority's governmental nature include that it is a creature of statute; that it is defined as a "*public* body corporate and *politic*" (emphasis supplied); that its Board is appointed by the governing body of the relevant political subdivision or subdivisions; that it is tax exempt; that it is deemed to exercise public and essential governmental functions; that it may exercise the power of eminent domain; that it receives tax revenues; and that the governing bodies of the relevant political subdivisions have a role in determining the disposition of its property upon dissolution.

Cox, Enterprises v. Carroll City/County Hospital Authority, 247 Ga. 39, 273 S.E.2d 841, 845 (1981). After careful analysis, the court in *Cox Enterprises,* concluded that hospital authorities are instrumentalities of the state, i.e., they are the manner in which the state has determined to conduct its business. *Id.*, 273 S.E.2d at 846. Accordingly, the court held that, as a governmental entity, the authority's attempt to bring a libel action was unconstitutional. *Id.*

We are satisfied that the Authority is an instrumentality, agency, or "political subdivision" of Georgia for purposes of state action immunity; thus, we need not apply the active state supervision requirement. Although *Thomas* held that hospital authorities are not part of the State or county for purposes of state sovereign immunity, the different policy reasons underlying state action immunity indicate that Georgia's hospital authorities are political subdivisions for state action immunity purposes. As noted above, this determination is guided by the rationale of *Town of Hallie.* Applying that rationale, we conclude that the nexus between the State and the Authority is sufficiently strong that, when combined with a clearly articulated policy in favor of the challenged anticompetitive conduct, there is little danger that it is involved in a *private* price-fixing arrangement. *See Town of Hallie,* 471 U.S. at 47, 105 S. Ct. at 1720. *Cf. Porter Testing Laboratory v. Board of Regents,* 993 F.2d 768, 772 (10th Cir.), *cert. denied,* 510 U.S. 932, 114 S. Ct. 344, 126 L. Ed. 2d 309 (1993) (holding that the active state supervision requirement applies only to purely private parties).

Georgia has chosen to operate its hospitals through the instrumentality of hospital authorities and, accordingly, it has clothed these authorities with certain necessary governmental qualities. *Cf. Cox Enterprises,* 273 S.E.2d at 846 ("Certainly

the government is authorized to operate hospitals, either directly or, as here, indirectly."). Although hospital authorities may not possess all of the powers enjoyed by municipalities or by the State, they enjoy numerous governmental powers. Further, the legislature has unambiguously stated that they are "public bodies" which exercise "public and essential governmental functions." O.C.G.A. §§ 31-7-72, 31-7-75. Georgia has also empowered hospital authorities to act as market participants in several respects by granting them several powers which resemble those of a private corporation. There mere grant of such powers, however, does not transform an otherwise governmental entity into a private actor of the type we would expect to engage in a private price-fixing agreement. The governmental powers enjoyed by the Authority are similar in material respects to those of a hospital that is directly operated by the State. None of its non-governmental aspects create a danger that it is involved in a private price-fixing arrangement.

The policy rationale employed by the court in *Thomas,* does not aid Dr. Crosby's cause. The fact that the Authority engages in the competitive business of health care, or operating a hospital, does not remove it from the protective cloak of state action immunity. It is axiomatic that state action immunity includes protection for states when they engage in business. To follow the policy rationale in *Thomas* and withhold immunity in those cases where the state chooses "to enter an area of business ordinarily carried on by private enterprise," would be to virtually eliminate state action immunity altogether.[14]

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14. The parties have not argued and we decline to address the Supreme Court's invitation to employ a "market participant" exception to state action immunity. *See City of Columbia v. Omni Outdoor Advertising,* 499 U.S. 365, 374-75, 379, 111 S. Ct. 1344, 1351, 1353, 113 L. Ed. 2d 382 (1991). *See also Genentech, Inc. v. Eli Lilly and Co.,* 998 F.2d 931, 948 (Fed. Cir. 1993), *cert. denied,* 510 U.S. 1140, 114 S. Ct. 1126, 127 L. Ed. 2d 434 (1994).

Accordingly, we hold that the Authority is a "political subdivision" of Georgia such that it is unnecessary to apply *Midcal's* active state supervision requirement. Further, there has been no argument that we should apply a different test to the Authority's board members, and we decline to do so.

2. *Members of peer review committees*

Appellants also argue that the district court erred in its determination that the individual doctors who served on the various peer review committees were agents of the Authority and, therefore, were entitled to the single-prong *Town of Hallie* test. *See Crosby,* 873 F. Supp. at 1576. The district court relied on *Cohn v. Bond,* 953 F.2d 154, 158 (4th Cir. 1991), *cert. denied,* 505 U.S. 1230, 112 S. Ct. 3057, 120 L. Ed. 2d 922 (1992), for the conclusion that individual hospital staff members in this case should be treated as the Authority's agents, i.e., as a political subdivision, for state action immunity purposes.

In *Cohn,* the Fourth Circuit held that medical staff members of a municipally owned and operated hospital, when making their recommendations to deny hospital privileges, acted as agents of that hospital. *Id.* at 157-58.

> [W]hen members of the medical staff recommended action on an application for privileges, as authorized by the municipal hospital, they are acting in their capacity as employees, as opposed to private parties. [*Oksanen v. Page Mem. Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc), *cert. denied,* 502 U.S. 1074, 112 S. Ct. 973, 117 L. Ed. 2d 137 (1992)]. Physicians who make peer

> review decisions at the behest of, or by delegation from, the hospital's board of trustees, are acting as agents of the hospital and are therefore, indistinguishable from the hospital.

Id. Because the doctors were agents of the hospital, the court held that the "active supervision" prong was inapplicable. *Id.* at 158-59. "The actions of the staff are immune when as is true here, they are acting as agents of . . . a municipal hospital . . . in making their recommendations." *Id.* The court relied exclusively on *Oksanen, supra,* for its conclusion that physicians on peer review committees act as agents of the hospital. *Cohn,* 953 F.2d at 158 ("As previously discussed, members of the medical staff acted as agents of [the] Hospital in making their recommendation to deny hospital privileges. The second, "active supervision" prong is, therefore, inapplicable in this case.").

In *Oksanen,* the Fourth Circuit examined whether plaintiff had established the existence of a contract, combination, or conspiracy under section one of the Sherman Act. 945 F.2d at 702. Section one of the Sherman Act does not apply to unilateral action; it proscribes only concerted action which imposes an unreasonable restraint on trade. *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752, 760-61, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984); *Albrecht v. Herald Co.,* 390 U.S. 145, 148, 88 S. Ct. 869, 871, 19 L. Ed. 2d 998 (1968). Under the intraenterprise immunity doctrine announced in *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 768-69, 104 S. Ct. 2731, 2740-41, 81 L. Ed. 2d 628 (1984), unilateral actions of a single enterprise do not constitute the type of concerted action proscribed by section one of the Sherman Act. Accordingly, an officer and an employee of the same company

are legally incapable of conspiring with one another. *Id.* 769, 104 S. Ct. at 2741. ("[O]fficers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.") (citation omitted). In *Copperweld,* the Court emphasized that an "internal 'agreement' to implement a single, unitary firms's policies" does not raise the anticompetitive concerns targeted by the Sherman Act. *Id.* at 769, 104 S. Ct. at 2740. "The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." *Id.* at 769, 104 S. Ct. at 2740-41. Likewise, coordinated conduct of a corporation and its unincorporated divisions or its wholly owned subsidiaries does not constitute a conspiracy, but rather, unilateral conduct. *Id.* at 771, 104 S. Ct. at 2741-42:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousness, but one. . . . With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action there is no sudden joining of economic resources that had previously served different economic interests, and there is no justification for § 1 scrutiny.

Id.

In *Oksanen,* the court held that, under *Copperweld's* intraenterprise immunity doctrine, a hospital and its medical staff lack the capacity to conspire during the peer review process. 945 F.2d at 703. In examining the relationship between a hospital and its medical staff during the peer review process, the court concluded that the medical staff works "as the Board's agent under an 'internal 'agreement' to implement a single, unitary firm's policies' of evaluating the conduct and competence of those to whom the hospital extends privileges." *Id.* (quoting *Copperweld,* 467 U.S. at 769, 104 S. Ct. at 2740). As such, "the peer review process does not represent the sudden joining of independent economic forces that section one is design to protect." *Id.; see also Copperweld,* 467 U.S. at 767-69, 104 S. Ct. at 2740. Instead, the hospital and its medical staff display a unity of interest when the staff takes part in hospital management decisions. *Oksanen,* 945 F.2d at 703. In addition, the court found it relevant to the *Copperweld* inquiry that the hospital retained ultimate control over staff credentialing decisions. *Id.* at 704 ("In *Copperweld,* the parent corporations's ability to exercise control over its subsidiary if the subsidiary failed to act in its best interests influenced the Court's decision that the coordinated activity of the two entities should be treated as that of a single entity.") (citing *Copperweld,* 467 U.S. at 769-73, 104 S. Ct. at 2741-42).

The holding in *Oksanen* dictated the result in *Cohn.* If a hospital and its staff during the course of peer review are functionally one entity, then, *a fortiori,* the staff members are (at the very least) agents of the hospital during peer review. Accordingly, *Cohn's* rationale persuades us only to the extent this circuit has embraced the rationale of *Oksanen.*

This circuit's counterpart to *Oksanen* is *Bolt v. Halifax Hosp.*

Medical Center (Bolt III), 891 F.2d 810, 819 (11th Cir. 1990), *implicitly overruled in part by City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991). *Bolt III* involved a physician whose medical staff privileges had been revoked at three different hospitals. The plaintiff-physician brought an antitrust action against the hospitals, their medical staffs, and a local medical society. In our first panel opinion, we held that the hospitals and their medical staffs were immune from suit under state action immunity. *See Bolt v. Halifax Hosp. Medical Center (Bolt I)*, 851 F.2d 1273, 1284 (11th Cir. 1988). *Bolt I* was vacated when the case was taken en banc. *See Bolt v. Halifax Hosp. Medical Center*, 861 F.2d 1233, 1234 (11th Cir. 1988). Before the en banc court, the hospitals and their medical staffs withdrew their arguments based on state action immunity. The en banc court directed the panel to reconsider its opinion in light of this explicit waiver. *See Bolt v. Halifax Hosp. Medical Center (Bolt II)*, 874 F.2d 755, 756 (11th Cir. 1989) (en banc). Accordingly, on remand in *Bolt III*, the panel considered the case anew, largely without state action immunity.[15]

In particular, in *Bolt III* we considered whether plaintiff had made out the contract, combination, or conspiracy element of his Sherman Act Claim. Like the court in *Oksanen*, we examined *Copperweld's* intraenterprise immunity doctrine in the context of peer review credentialing decisions. Noting that the "directed verdicts in this case would . . . have been proper if, as the defendants contend, the [hospital] defendants were legally incapable of concerted action within the meaning of

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15. State action immunity remained an issue in the case as to one of the hospital defendants who had presented a new state-action argument in its brief on rehearing en banc. *Bolt III*, 891 F.2d at 818 n. 12, 823 n. 22.

section 1 of the Sherman Act," the court in *Bolt III* examined whether such a conspiracy was possible. 891 F.2d at 818-19. The court rejected application of the intraenterprise immunity doctrine on the ground that the analogy between a corporation and its officers (or subsidiaries) and a hospital and its medical staff was inapt in some circumstances.

> The rule for corporations is based on considerations unique to the corporate context. Theoretically, a "conspiracy" involving a corporation and one of its agents would occur every time an agent performed some act in the course of his agency, for such an act would be deemed an act of the corporation. Thus, the rule that a corporation is incapable of conspiring with its agents is necessary to prevent erosion of the principle that section 1 does not reach unilateral acts. A hospital and the members of its medical staff, in contrast, are legally separate entities, and consequently no similar danger exists that what is in fact unilateral activity will be boot-strapped into a "conspiracy." *See Oltz v. St. Peters Community Hospital,* 861 F.2d 1440, 1450 (9th Cir. 1988).

Id. at 819. *Cf. St. Joseph's Hosp., Inc. v. Hospital Corp. of America,* 795 F.2d 948, 956 (11th Cir. 1986) ("[W]hile a corporation's officers and its employees are legally incapable of conspiring among themselves, if the 'officers or employees act for their own interests, and outside the interests of the corporation, they are legally capable of conspiring with their employees for purposes of Section 1.' " (quotation omitted).

Further, because each member of the medical staff practiced medicine individually, the court concluded that each is a "separate economic entity potentially in competition with other physicians." *Bolt III,* 891 F.2d at 819.[16] Unlike *Oksanen, Bolt*

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16. The court in *Bolt III* also examined whether one of the hospital defendants was entitled to state action immunity. *Id.* at 823-25. *See supra* note 15. It held that the Florida legislature had not clearly articulated a policy to displace competition because it had not foreseen that the hospital would conspire with its medical staff to deny plaintiff staff privileges on pretextual grounds. 891 F.2d at 825. Accordingly, because the State had not foreseen that particular *type* of anticompetitive conduct, the court found that the hospital was not protected by *Parker* immunity. However, in *Bolt v. Halifax Hosp. Medical Center (Bolt IV),* 980 F.2d 1381 (11th Cir. 1993), we held that the Supreme Court in *City of Columbia* rejected this part of *Bolt III:*

> [T]he Court [in *City of Columbia*] rejected federal judicial inquiry into the state officials' intent in undertaking the challenged action. Such an inquiry, the Court stated, "would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." [Cit.] . . .
>
> The inquiry into whether the reasons for [the hospital's] denial of staff privileges were pretextual would require probing into the "official intent" of HHMC, an inquiry expressly denounced by the Supreme Court. [Cit.]

Bolt IV, 980 F.2d at 1388 (quotation omitted). Accordingly, we held that *City of Columbia* implicitly overruled *Bolt III* in part.

City of Columbia left untouched, however, *Bolt III's* rejection of *Copperweld's* intraenterprise immunity doctrine in the context of hospital peer review decisions. This portion of *Bolt III* remains the law of this circuit.

III rejected application of the intraenterprise immunity doctrine to agreements between a hospital and its staff regarding staff privilege decisions.

Relying on *Bolt III*, in *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1446 n. 13 (11th Cir. 1991), we held that the individual doctors on the medical staff of defendant hospital were separate economic actors, not employees of the hospital, when they performed the challenged actions, and, therefore, were not entitled to share in the hospital's state action immunity. *Id.* at 1446 n. 13. Plaintiff in *Todorov* was a doctor of neurology and a staff member of the DCH Regional Medical Center (DCH), where he had been granted privileges to practice neurology. After becoming a member of the hospital staff, plaintiff applied for the privilege to perform certain procedures in DCH's radiology department.[17] After review of his application, the credentials committee sought recommendations from two of the physicians plaintiff had named as references; both were radiologists who practiced at DCH. These doctors did not recommend plaintiff. Indeed, they questioned his technical competence. The credentials committee then solicited the advice of the chairman of DCH's radiology department, who also recommended denial of plaintiff's application for privileges. The hospital, acting on the recommendation of the final peer committee to review plaintiff's case, denied plaintiff's application. Plaintiff initiated an action against DCH and the three radiologists who provided the negative recommendations. The district court held that DCH was immune from antitrust liability under the *Parker* doctrine because it was a local governmental entity and had acted pursuant to state authority

17. The hospital bylaws at DCH required a peer review process for credentialing decisions that was similar in relevant respects to the process at issue in the instant case.

in denying plaintiff's application for privileges. 921 F.2d at 1445. It also held that the individual radiologists were immune because they were "acting as employees of DCH and, as such, enjoyed DCH's immunity."[18] *Id.* at 1446. On appeal, this Court agreed that DCH was entitled to state action immunity; but, relying on *Bolt III,* we rejected the district court's rationale with respect to the radiologists' immunity:

> In [*Bolt III*], we held that members of a hospital's medical staff should be considered independent legal entities for antitrust purposes if they are not employed by the hospital and are acting as separate economic actors. . . . Here, the physicians are separate economic actors; thus, their actions are legally distinct from the hospital's actions. Accordingly, the district court could not properly base its summary judgment on the ground that the radiologists and DCH were a single legal entity.

Id. at 1446 n. 13.

The foregoing discussion demonstrates that *Cohn's* reasoning is not persuasive in this case. *Cohn* was dictated by *Oksanen's* holding that the hospital and its staff members on peer review committees are functionally one entity. In other words, if the hospital and the individual doctors are a single legal entity, it readily follows that the doctors are agents who should

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18. In the alternative, the district court held that the radiologists were protected by the *Noerr-Pennington* doctrine. *Id.* Opting to base our decision on other grounds, we declined to affirm on these grounds. *Id.* at 1446 at n. 14.

share the hospital's state action immunity. By contrast, in *Bolt III* we held that a hospital and its staff members on peer review committees are not functionally one entity to which *Cooperweld's* intraenterprise immunity doctrine applies. Accordingly, in *Todorov* we rejected the district court's rationale of treating the individual doctors as the same legal entity as the hospital. *See Todorov,* 921 F.2d at 1446 n. 13 ("Accordingly, the district court could not properly base its summary judgment *on the ground that the radiologists and DCH were a single legal entity.*") (emphasis added).

However, the rationale of *Bolt III* and *Todorov* does not govern the different issue in this case. Even though the Authority and its individual doctors are not per se the same legal entity, we must nevertheless inquire whether the particular actions of the individual doctors which are challenged in this case were actions taken by the doctors in performing official duties as agents of the hospital such that they should share the hospital's state action immunity. In other words, the fact that a hospital and its staff are separate economic or legal entities does not mean that a staff physician cannot be the agent of a hospital for certain purposes and in certain circumstances (e.g., certain administrative functions like peer review activities). In short, a hospital and its staff can be separate entities for purposes of intraenterprise immunity, but the staff physicians may in certain contexts be agents of the hospital for purposes of state action immunity. The policies underlying these two immunity doctrines are different as are the factors which guide our analysis.[19]

19. In the text we explain how *Todorov* is distinguished from this case because it merely rejected the same-legal-entity rationale. *Todorov* is also distinguishable on its facts. In *Todorov,* the challenged actions of the individual doctors were not actions in the performance of official duties as peer review

(Cont'd)

Appendix A

To determine whether the individual doctors here were agents of the Authority during the performance of the challenged actions, we look to the policies underlying the state action immunity doctrine and the context of the particular activities of the doctors in this case. The core policy underlying *Parker* immunity is that actions by the State, as sovereign, lie beyond the intended scope of the antitrust laws. *See Parker,* 317 U.S. at 352, 63 S.Ct. at 314 ("The state . . . , as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.") (citation omitted); *Town of Hallie,* 471 U.S. at 38, 105 S.Ct. at 1716 ("In *Parker,* . . . the Court refused to construe the Sherman Act as applying to the anticomopetitive conduct of a State acting through its legislature. . . . Rather, it ruled that the Sherman Act was intended to prohibit *private* restraints on trade. . . .") (quotation omitted); *Patrick v. Burget,* 486 U.S. 94, 99, 108 S.Ct. 1658, 1662, 100 L.Ed.2d 83 (1988) ("The Sherman Act . . . was not intended to 'to restrain state action or official action directed by the state' ") (quotation omitted). What is critical is that the action be truly that of the State and not that of an individual or private actor. The "clear articulation" and "active state supervision" tests reflect this core policy. These tests are designed to ensure that the action taken was truly *state* action inasmuch as they require different levels of state involvement in the challenged action depending on whether the actor is a municipality or a private party. *See, e.g., Patrick,* 486 U.S. at 100, 108 S.Ct. at 1662 ("We . . . established a rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties

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(Cont'd)
committee members; rather, the individual doctors merely gave negative recommendations about plaintiff to the relevant peer review committees. By contrast, the challenged actions of the individual doctors in the instant case were all taken within the scope of their official duties as members of the hospital's peer review committees. *See infra* note 20.

should be deemed state action and thus shielded from the antitrust laws.").

The actions of the individual doctor-defendants which are challenged in this case consisted exclusively of official actions taken as members of the hospital's peer review committees.[20] Accordingly, the issue in this case is whether the doctors' activities on SGMC peer review committees should be considered action taken by the Authority (i.e., by the political subdivision) or action taken by the individual doctors (i.e., by private parties). To determine whether the challenged actions were those of the Authority qua political subdivision, we are guided by *Town of Hallie, supra*. There, the Supreme Court distinguished between actions by political subdivisions, which are presumptively intended to further governmental interests if undertaken pursuant to clearly articulated state policy, and actions by private parties, which are presumptively intended to further private interests. *See Town of Hallie,* 471 U.S. at 47, 105 S.Ct. at 1720. The appropriate inquiry focuses on whether "there is little or no danger that [the actor] is involved in a *private* price-fixing arrangement," *id.*, as opposed to state action vindicating a truly governmental interest. As was true with respect to the Authority, we examine whether the nexus between the State and the actions of the doctors on peer review committees is sufficiently strong that there is little real danger that these doctors are involved in a *private* price-fixing arrangement.

Because of the control exercised by the Authority over peer review decisions and the statutory context of peer review in Georgia, we conclude that the actions of individual doctors on

20. The district court found that each individual doctor defendant acted within the scope of his or her duty as a member of the varioius credentialing committees. *Crosby,* 873 F.Supp. at 1571. This finding is not clearly erroneous.

peer review committees should be considered actions of the Authority such that the "active state supervision" requirement is unnecessary to ensure that the challenged actions are truly those of the State. First, the control exercised by the Authority over all staff credentialing decisions is strong evidence that it is the Authority and not its staff members acting. Under the Bylaws, the Authority retains power over decisions to grant or deny hospital privileges. Although the numerous layers of staff committees recommend the grant or denial of staff privileges to the Authority, the Authority is the repository of ultimate decision making power and exercises plenary review of all credentialing decisions. *Cf. Ramey v. Hospital Auth. of Habersham County,* 218 Ga.App. 618, 462 S.E.2d 787, 788 (1995) ("[U]nder the law of this state the hospital authority, and not the medical staff, is responsible for selecting staff members."). Under the Bylaws, the Authority does not merely "rubber stamp" the committee recommendations; instead, it conducts an independent, meaningful review. It retains the power to follow, modify, or even disregard the recommendations of staff committees. In this case, it rendered its decision only after a full hearing at which Dr. Crosby was represented by counsel.[21]

Second, our conclusion derives strong support from the statutory context of peer review in Georgia. Under O.C.G.A. § 31-7-15, hospitals are required to provide for the review of

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21. At this hearing before the Authority, Crosby was free to present evidence and argument that the several recommendations of the hospital's peer review committees were influenced by improper and irrelevant anticompetitive motives. We must assume that the Authority would have favorably entertained such arguments and evidence had they been persuasive; we must neither deconstruct the Authority's mental processes nor probe its intent. *City of Columbia,* 499 U.S. at 377, 111 S.Ct. at 1352.

professional practices in the hospital.[22] Specifically, hospitals

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22. O.C.G.A. § 31-7-15, provides, in relevant part:

> (a) A hospital . . . shall provide for the review of professional practices in the hospital . . . for the purpose of reducing morbidity and mortality and for the improvement of the care of patients in the hospital. . . . This review shall include, but shall not be limited to, the folliwing: . . .
>
> > (3) The evaluation of medical and health care services or the qualifications and professional competence of persons performing or seeking to perform such services.
>
> (b) The functions required by subsection (a) of this Code section may be performed by a "peer review committee," defined as a committee of physicians appointed by a state or local or specialty medical society or appointed by the governing board or medical staff of a licensed hospital or ambulatory surgical center or any other organization formed pursuant to state or federal law and engaged by the hospital . . . for the purposes of performing such functions required by subsection (a) of this Code section.
>
> (c) Compliance with the above provisions of subsection (a) of this Code section shall constitute a requirement for granting or renewing the permit of a hospital. . . .

(Cont'd)

are directed to evaluate the qualifications and professional competence of persons seeking to perform medical and health care services at the hospital. § 31-7-15(a)(3). Indeed, hospitals must undertake such evaluations to be entitled to a permit. § 31-7-15(c). The statute permits peer review committees to perform such evaluations. § 31-7-15(b). These committees may be appointed by, *inter alia,* the governing board or medical staff of a licensed hospital. *Id.* This statutory scheme reflects the reality of management at the Authority (and other hospitals). Physicians at hospitals often work in a variety of capacities. Primarily, they are "separate economic entities," i.e., independent contractors, as noted by the court in *Bolt III.* At times, they also function as part of the hospital's management structure.[23] In particular, they are called on to aid in staff credentialing decisions because they are in the best position to measure the quality of a physician's work and credentials, a proposition recognized by § 31-7-15.

For these reasons, we are satisfied that there is little or no danger of a private price fixing arrangement in this case such that the imposition of "active state supervision" is required. The Authority is a political subdivision of Georgia. As explicitly authorized by statute, it receives recommendations as to staff privilege decisions from peer review committees. It has not

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> (e) Nothing in this or any other Code section shall be deemed to require any hospital or ambulatory surgical center to grant medical staff membership or privileges to any licensed practitioner of the healing arts.

23. *See, e.g.,* William S. Brewbaker, "Antitrust Conspiracy Doctrine and Hospital Enterprise," 74 B.U.L.Rev. 67 (1994).

delegated absolute control of these commitees;[24] instead, the Authority alone exercises ultimate control over all credentialing decisions. The only actions in this case were those of the Authority, a political subdivision of Georgia. Were we to rule otherwise, the state action immunity afforded the Authority would be meaningless because as a practical matter the Authority must act through its agents. In this case, we hold that the individual peer review committee members are immune from federal antitrust liability to the extent the Authority is immune.[25]

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24. In this case, we need not and do not address the issue of whether *Midcal's* active state supervision requirement would apply to the activities of peer review committee members if the peer review committees exercised unbridled discretion in making staff privilege decisions — i.e., if the Authoirity had completely delegated this function to the peer review committees of the medical staff.

25. Dr. Crosby rejoins that the reasons proffered by the various peer review committees were a mere pretext for their true anticompetitive motives. As *City of Columbia* directs, however, once it is determined that the denial of Crosby's application for staff privileges were "state action." the individual motives underlying that action become irrelevant. *City of Columbia*, 499 U.S. at 377-78, 111 S.Ct. at 1352 (" '[W]here the action complained of . . . was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action.' ") (quotation omitted). "*[A]ny* action that qualifies as state action is '*ipso facto* . . . exempt from the operation of the antitrust laws'. . . ." *Id.*, 499 U.S. at 379, at 1353 (quoting *Hoover v. Ronwin*, 466 U.S. 558, 568, 104 S.Ct. 1989, 1995, 80 L.Ed.2d 590 (1984)). Because the individual staff members were acting as agents of the Authority in making their peer review recommendations, they were acting at the behest of and as an arm of the State and, therefore, their motives are irrelevant so long as the challenged actions were undertaken pursuant to clearly articulated state policy. Crosby had an opportunity at the hearing before the Authority to demonstrate that the peer review committee members made their recommendations for improper and irrelevant anticompetitive reasons. We cannot probe the Authority's intent in rejecting any such arguments by Crosby.

Appendix A

C. *Clear Articulation*

In this circuit, we have established a three-part inquiry to determine whether an entity satisfies the single-prong ("clear articulation") test set forth in *Town of Hallie, supra.* The entity must show: "(1) that it is a political subdivision of the state; (2) that, through statutes, the state generally authorizes the political subdivision to perform the challenged action; and (3) that, through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct." *FTC v. Hospital Board of Directors of Lee County,* 38 F.3d 1184, 1187-88 (11th Cir. 1994). Because we have determined that defendants are a political subdivision of the State and the parties concede that Georgia generally authorizes them to perform the challenged action,[26] we proceed to the third part.

The third requirement under the *Lee County* test is that the State must, through its statutes, clearly articulate a policy authorizing the challenged anticompetitive conduct. *Id.* at 1187-88. The Supreme Court has noted that the phrase "clearly expressed" does not require the legislature to state explicitly that it anticipates anticompetitive effects. *Town of Hallie,* 471 U.S. at 42, 105 S.Ct. at 1718; *see also Southern Motor Carriers Rate Conf. v. United States,* 471 U.S. 48, 64-65, 105 S.Ct. 1721, 1731, 85 L.Ed.2d 36 (1985) ("[I]f the State's intent to establish an anticompetitive regulatory program is clear . . . ,

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26. The district court stated that whether Georgia has authorized the challenged conduct was not at issue. 873 F.Supp. at 1578 n.10. Crosby has not argued otherwise and, accordingly, we do not specifically address this issue. We note, however, that in examining whether Georgia, through its statutes, has clearly articulated a state policy in favor of the alleged anticompetitive conduct, we necessarily touch on this issue.

the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of federal antitrust laws."). "Rather, it simply requires that the anticompetitive conduct be a foreseeable result of the powers granted to the political subdivision." *Lee County,* 38 F.3d at 1189 (citing *Town of Hallie, supra*). This circuit requires "only that the anticompetitive conduct be reasonably anticipated, rather than the inevitable, ordinary, or routine outcome of a statute." *Id.* at 1190-91.

Accordingly, we must determine whether the alleged anticompetitive conduct is a reasonably foreseeable result of the statutes authorizing the Authority to grant or deny staff privilege applications. To do so, we must identify precisely the alleged anticompetitive conduct. Dr. Crosby alleges that the Authority denied his application for staff privileges at SGMC because its doctors determined there to be a sufficient number of orthopedic surgeons with such privileges. As he sees it, the hospital sought to suppress competition at SGMC so as to maintain each doctor's current level of business and income and to inflate prices.[27]

In this case, the Authority's power to grant or deny staff privileges derives from O.C.G.A. § 31-7-7, which provides in relevant part:

> (a) Whenever any licensed *doctor of medicine, doctor of podiatric medicine,*

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27. Dr. Crosby also alleges that the Authority denied his application because he is an osteopathic physician. To the extent this claim fits into the antitrust model, it is subsumed in the argument set forth in the text.

Appendix A

doctor of osteopathic medicine, or doctor of dentistry shall make application for permission to treat patients in any hospital owned or operated by the state, any political subdivision thereof, or any municipality, the hospital shall act in a nondiscriminatory manner upon such application expeditiously and without unnecessary delay considering the applicant on the basis of the applicant's demonstrated training, experience, competence, and *availability and reasonable objectives, including, but not limited to, the appropriate utilization of hospital facilities. . . .*

(b) Whenever any hospital owned or operated by the state, any political subdivision thereof, or any municipality shall refuse to grant a *licensed doctor of medicine, doctor of podiatric medicine, doctor of osteopathic medicine, or doctor of denistry* the privilege of treating patients in the hospital, wholly or in part, or revoke the privilege of such licensed medical practitioner for treating patients in such hospital, wholly or in part, the hospital shall furnish to the licensed medical practitioner whose privilege has been refused or revoked, within ten days of such action, a written statement of the reason therefor. . . .

(emphasis added).

The emphasized language reflects relevant amendments incorporated into the statute in 1990. The parties generally base their arguments on the previous version of the statute which, *inter alia,* omitted the language in subsection (a) which authorizes the Authority to consider applications based on the "appropriate utilization of hospital facilities." Appellant assumes that, because the events in this case took place in 1986 and 1987, the prior version of the statute applies.

The district court applied the new version of the statute without discussion of the prior version. *Crosby,* 873 F.Supp. at 1579. It concluded that "[t]he Georgia legislature could have foreseen, or at least reasonably anticipated, that authorities would consider the number of market participants in determining the 'appropriate utilization of hospital facilities.' " *Id.*

The district court was correct to apply the new version of the statute. As discussed *infra,*[28] Dr. Crosby's action for damages against all defendants is barred by the Local Government Antitrust Act. Consequently, he is limited to injunctive relief. Because injunctive relief is prospective, a party seeking an injunction must show a threat of future injury. "Logically, 'a prospective remedy will provide no relief for an injury that is, and likely will remain, entirely in the past.' " *Church v. City of Huntsville,* 30 F.3d 1332, 1337 (11th Cir. 1994) (quoting *American Postal Workers Union v. Frank,* 968 F.2d 1373, 1376 (1st Cir. 1992)). This concept has been described as one of mootness.

> At every stage in the proceedings the court must 'stop, look, and listen' to determine the

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28. See *infra* Section II.D.

> impact of changes in the law on the case before it. *Kremens v. Bartley,* 431 U.S. 119, 135, 97 S.Ct. 1709, 1718, 52 L.Ed.2d 184 (1977) (impact of changes in challenged statute on composition of certified class of plaintiffs). Where a law is amended so as to remove its challenged features, the claim for injunctive relief becomes moot as to those features. [Cits].

Naturist Soc., Inc. v. Fillyaw, 958 F.2d 1515, 1519-21 (11th Cir. 1992). "Thus, a superseding statute or regulation moots a case only to the extent that it removes challenged features of the prior law." *Id.*

In this case, by way of injunctive relief, Crosby does not seek reinstatement, but rather, an order directing the Authority to review his application anew.[29] Assuming, *arguendo,* we undertook a review of the old (1984) version of O.C.G.A. § 31-7-7 and concluded that the Authority did not act pursuant to a clearly articulated state policy, any order we issued would not solve Dr. Crosby's problem. If we ordered that the Authority review Dr. Crosby's application again, such review would take place under the new (1990) version of O.C.G.A. § 31-7-7.

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29. In his brief, Dr. Crosby states:

> Appellant, Dr. Crosby, has not and does not seek an order directing that the Authority grant him staff privileges. He seeks to have injunctive relief to ensure that he is placed on a level playing field with the alloathic competitors. He also seeks monetary damages for the conduct of the private defendant physicians who participated in the denial of his staff privileges.

Accordingly, the issue of whether the old version of the statute clearly articulates the requisite policy is moot. We must review the current statute as amended to determine whether Georgia has clearly articulated the challenged anti-competitive conduct. In short, because injunctive relief is prospective, Dr. Crosby's claim travels under the new version of the statute. *See Landgraf v. USI Film Products,* 511 U.S. 244, __, 114 S.Ct. 1483, 1501, 128 L.Ed.2d 229 (1994) ("[R]elief by injunction operates *in futuro*. . . .").

The clear articulation question is not a close one. Hospitals may make staff privilege decisions based on any reasonable objective, "including, but not limited to, the appropriate utilization of hospital facilities." O.C.G.A. § 31-7-7. We agree with the district court that is "is at the very least foreseeable, and most certainly reasonably anticipated, that this language would enable a hospital authority to engage in anticompetitive conduct through its peer review activities." *Crosby,* 873 F.Supp. at 1579. This is not the type of case in which we must discern what type of conduct is reasonably anticipated from a broad authorization to act. Rather, the statute explicitly provides for precisely the anticompetitive conduct about which Dr. Crosby complains. At worst, Dr. Crosby alleges that the SGMC orthopedic surgeons determined that their services were sufficient to meet the demand for their specialty at the hospital and, therefore, agreed to deny Dr. Crosby hospital privileges. This is exactly what the statute directs SGMC and the Authority to do. We readily conclude that O.C.G.A. § 31-7-7 evidences a state policy in favor of the anticompetitive conduct challenged in this case and hold that all defendants are shielded from suit for injunctive relief by state action immunity.[30]

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30. Our conclusion that Georgia has reasonably anticipated the anticompetitive effects of hospital peer review decisions also derives strong

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The foregoing result is more readily reached than the similar results in *Bolt IV*, 980 F.2d at 1386 (reinstating, in part, the rationale of *Bolt III*, 891 F.2d at 825 ("[O]ne could correctly say that when Florida's legislature authorized peer review in licensed medical facilities, . . . it could foresee that [the hospital] would rely on recommendations made by a physician's peers and refuse to deal with (i.e., boycott) that physician.")); and *Lee County*, 38 F.3d at 1192 (holding that when the state legislature expanded the hospital board's powers to acquire other hospitals, it was foreseeable that new acquisitions would result and that this would increase the board's market share in an anticompetitive manner). These cases illustrate that "reasonable anticipation" does not require explicit authorization to engage in anticompetitive conduct.

Our conclusion is not altered by Dr. Crosby's argument that Georgia's Constitution establishes a policy against restraints on trade. Article III, § 6, ¶ 5 of the Georgia Constitution of 1983 provides that

> the General Assembly shall not have the power to authorize any contract or agreement which may have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void.

We will not undertake an examination of whether the legislature's clear articulation of anticompetitive policy in

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support from O.C.G.A. § 31-7-15, the statute authorizing peer review. *See supra* note 22. This statute indicates the legislature's recognition that staff credentialing decisons will be aided by the use of peer review committees. *Accord Bolt IV*, 980 F.2d at 1386.

O.C.G.A. § 31-7-7 violates this constitutional provision; we do not sit to determine whether a state statute violates state law for purposes of state action immunity. It is sufficient that Georgia has generally authorized the challenged anticompetitive conduct. *Cf. City of Columbia v. Omni Outdoor Advertising,* 499 U.S. 365, 371-72, 111 S.Ct. 1344, 1350, 113 L.Ed.2d 382 (1991) ("[I]n order to prevent *Parker* from undermining the very interest of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law.") Insofar as Crosby argues that the constitutional provision simply clarifies state policy[31] (i.e., not that it renders the statute unconstitutional), we find that such policy has been tempered by a "rule of reason." *See Ferrero v. Assoc. Materials, Inc.,* 923 F.2d 1441, 1447 (11th Cir. 1991). "The rule of reason protects those contracts which are reasonable in light of the interests of the parties and the interests of the public." *Id.* at 1447. As the district court found, the rule of reason protects contracts executed pursuant to O.C.G.A.§ 31-7-7. The parties to SGMC's by-laws and the public have an interest in "the appropriate utilization of hospital facilities," i.e., maintaining a proper mix of doctors and specialties at the hospital so as to attract the optimal number of qualified professionals. O.C.G.A. § 31-7-7 is a reasonable response to such interest because it allows hospitals to make their staff credentialing decisions based on such criteria. *See Crosby,* 873 F.Supp. at 1579-81.

In sum, the statutory language here easily surpasses the "clear articulation" mark. Further, given the mitigating influence

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31. *Cf. Atlanta Center Ltd. v. Hilton Hotels Corp.,* 848 F.2d 146, 148 (11th Cir. 1988) ("The state of Georgia has expressed, both in its constitution and in its statutory law, a strong public policy disfavoring contractual restraints on competition and trade.").

of the rule of reason, it is at the very least reasonably foreseeable that O.C.G.A. § 31-7-7 would lead hospital decisionmakers to act anticompetitively in determining the "appropriate utilization of facilities" notwithstanding Article III, § 6 ¶ 5 of the Georgia Constitution. Accordingly, we readily conclude that all defendants are shielded from suit for injunctive relief by state action immunity.[32]

D. *Local Government Antitrust Act*

The district court held that the Local Government Antitrust Act of 1984 ("LGAA"), 15 U.S.C.A. § 34 et seq., precludes Dr. Crosby's action for damages against all defendants. *Crosby*, 873 F.Supp. at 1581. Dr. Crosby does not contest this conclusion as to the Authority or its board members. He argues, however, that the individual committee members are not immunized by the LGAA.

The LGAA provides, in relevant part:

> No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton act (15

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32. Dr. Crosby urges that a different conclusion is mandated by *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). His argument focuses on *Ticor's* insistence on real compliance with the active supervision requirement. *Id.*, 504 U.S. at 633-39, 112 S.Ct. at 2177-79. The foregoing discussion makes clear that this aspect of *Ticor* has no bearing on this case because we need not reach the "active supervision" requirement. As to the "clear articulation" requirement, the Court in dicta reiterated that "[i]n the usual case, *Midcal's* requirement that the State articulate a clear policy shows little more than that the State has not acted through inadvertence. . . ." *Id.*, 504 U.S. at 636, 112 S.Ct. at 2178. As the discussion *supra* makes clear, Georgia's statutory action reasonably portends the challenged anticompetitive conduct in this case.

> U.S.C. 15, 15a, or 15c) in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

15 U.S.C.A. § 36(a). Section 4 of the Clayton Act provides the damages remedy for violations of the Sherman Act; thus, it applies to Dr. Crosby's allegations. We must determine whether the actions of the individual committee members constitute "official action[s] directed by a local government, or official or employee thereof acting in an official capacity."[33]

As to the phrase "action directed by a local government," the Joint Report of the Conference Committee explains:

> In Referring in section 4 to the applications of the antitrust laws to the conduct of non-governmental parties *directed by a local government,* the conferees borrowed the phrase *"official action directed by"* a local government from *Parker v. Brown,* 317 U.S. 341, 351 [63 S.Ct. 307, 313, 87 L.Ed. 315] (1941); and the conferees intend that *Parker* and subsequent cases interpreting it shall apply by analogy to the conduct of a local government in directing the actions of non-

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33. Dr. Crosby essentially concedes that the Authority falls within the definition of "local government" and that the individual committee members are "persons" within the meaning of the LGAA by failing to argue otherwise on appeal. *See Cheffer v. Remo,* 55 F.3d 1517, 1519 n. 1 (11th Cir. 1995) (issues not argued in brief deemed abandoned); *see also* Fed.R.App.P. 28 (a)(6).

> governmental parties, as if the local government were a state.

H.R.Conf.Rep. No. 1158, 98th Cong., 2d Sess. 3, *reprinted in* 1984 U.S.C.C.A.N. 4602, 4626-27 (emphasis added). The analogy to the *Parker* doctrine is confirmed by comparing the language in the statute to that in *Parker*. *Parker* held that the federal antitrust laws were not intended "to restrain a state or its officers or agents from activities *directed by* its legislature." 317 U.S. at 350-51, 63 S.Ct. at 313 (emphasis added); *see also City of Lafayette, La. v. La. Power & Light Co.*, 435 U.S. 389, 409, 98 S.Ct. 1123, 1134, 55 L.Ed.2d 364 (1978). It is clear that the language in the statute (i.e., "action directed by a local government") was based on the above-quoted language in *Parker*.

As discussed *supra*, the *Parker* doctrine has developed such that, where the defendant is a private actor (i.e., not a "municipality"), he or she must show both that: 1) the challenged restraint is one clearly articulated and affirmatively expressed as state policy; and 2) the policy is actively supervised by the state. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633, 112 S. Ct. 2169, 2176, 119 L. Ed. 2d 410 (1992); *California Retail Liquor Dealors Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980).

Following the legislative intent embodied in the Joint Report of the Conference Committee, we apply by analogy the *Parker* doctrine to the relationship between the Authority (i.e., the entity under the LGAA which is analogous to the State in the state action immunity context) and the individual committee members (i.e., the entities under the LGAA which are analogous

to private parties in the state action immunity context).[34] *See Cohn v. Bond*, 953 F.2d 154, 157 (4th Cir. 1991), *cert. denied*, 505 U.S. 1230, 112 S.Ct. 3057, 120 L.Ed.2d 922 (1992) ("Whether actions are directed by an official, as contemplated by the LGAA, is determined by borrowing and applying the State Action Doctrine two prong test"); *Sandcrest Outpatient Servs. P.A. v. Cumberland County Hospital System, Inc.* 853 F.2d 1139, 1143 (4th Cir. 1988) (Powell, Associate Justice (retired)) (undertaking similar analysis).

The challenged actions of the individual committee members in the case easily satisfy the two-prong *Midcal* test of clear articulation and active supervision. First, the individual committee members acted pursuant to clearly articulated policy of the Authority to deny privileges when the applicant had not completed the necessary residency. Specifically, the individual committee members acted pursuant to the Bylaws (adopted and approved by the Authority) in making recommendations to the Authority to deny Crosby's hospital privileges. Second, the Authority itself actively supervised the committees; as noted above, the Authority made the final decision to deny Crosby's privileges after a full hearing thereon. As noted *supra*, the language of the statute (contemplating immunity for the actions of a private person "based on any official action directed by a local government, or official or employee thereof acting in an official capacity"), the legislative history, and the case law (*Cohn, supra; Sandcrest, supra*) make it clear that the second prong of the *Midcal* test is satisfied when the local government, in this case the Authority, actively supervises the challenged conduct.

Thus, we readily conclude that the two-prong *Midcal* test

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34. *See infra*, note 35.

is satisfied, and that the challenged actions of the individual committee members in this case fall comfortably within the phrase "official action directed by a local government."[35] We hold that the individual committee members are immune from damages under the LGAA.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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35. We recognize that our holding, *supra*, that the actions of the individual doctors should be considered actions of the Authority for purposes of state action immunity may mean the individual doctors are directly immune under the LGAA, 15 U.S.C.A. § 35(a). Section 35(a) provides that no damages may be recovered from a local government, or an official or employee thereof acting in an official capacity. However, we also recognize that the specificity of the LGAA's language in § 35(a) ("local government, or official or employee") might suggest that agents other than "officials" or "employees" are not directly immune. In any event, we need not decide whether the individual committee members should be deemed the equivalent of the local government, or an official or employee of the local government for purposes of the LGAA because the two-prong *Midcal* test is so readily satisfied, and the doctors are clearly immune under § 36(a).

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT, M.D. GEORGIA, VALDOSTA DIVISION DATED JANUARY 12, 1995

R. Derry CROSBY, D.O., Plaintiff,

v.

HOSPITAL AUTHORITY OF VALDOSTA and Lowndes County, et al., Defendants.

Civ. A. No. 90-23-VAL (WDO).

United States District Court.
M.D. Georgia,
Valdosta Division.

Jan. 12, 1995.

* * *

Olin Wayne Ellerbee, Valdosta, GA, and Lewis H. Markowitz, York, PA for plaintiff.

William Gus Elliott, Valdosta, GA, and Joseph William Watkins, Sidney F. Wheeler, and Debra E. LeVorse, Atlanta, GA, for defendants.

ORDER

OWENS, Chief Judge.

Before the court is defendants' motion for summary judgment. Plaintiff, an osteopathic doctor, has sued defendants claiming that their refusal of orthopedic surgical staff privileges to him constitutes a violation of federal and state antitrust laws. Defendants contend that one of several immunities entitles them

to summary judgment. After careful consideration of the arguments of counsel, the relevant caselaw, and the record as a whole, the court issues the following order.

I. *INTRODUCTION*

R. Derry Crosby, a doctor of osteopathy, is the plaintiff in this case. On March 14, 1990, he filed a complaint against defendants — Lowndes County Hospital Authority ("Authority"), d/b/a South Georgia Medical Center ("SGMC"), the Board Members of the Authority, and the staff physicians who participated in a decision to deny him orthopedic surgical staff privileges ("staff members"). Plaintiffs complaint challenges defendants' actions in denying him orthopedic surgical staff privileges.

In his complaint, plaintiff alleges four theories of recovery based upon defendants' conduct — the first two presenting federal questions, the latter two premised upon state law. Plaintiff's first and second claims, respectively, assert defendants' conduct was a restraint of trade in violation of 15 U.S.C. § 1 and that the same conduct amounted to monopolization, or an attempt to monopolize, in contravention of 15 U.S.C. § 2. Plaintiff's third claim, based on state law, is apparently founded on Official Code of Georgia Annotated ("O.C.G.A.") § 16-10-22, and the fourth on whatever common law prohibitions Georgia might possess. The court says "apparently" since plaintiff's complaint and brief failed to cite a code section supporting his state antitrust claim, and failed to cite to any Georgia cases enunciating common law antitrust prohibitions. Plaintiff's lawsuit by agreement of counsel is now limited to antitrust violations. Transcript of In-Chambers Conference of 3/6/92, at 37.

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Defendants' initial responsive pleading was accompanied by their motion to dismiss and brief in support thereof. Defendants first asserted the "state action" doctrine, originally enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), as the source of an absolute immunity from suit. As an alternative, defendants raised the Local Government Antitrust Act ("LGAA"), 15 U.S.C.A §§ 34-36 (Supp. 1994), which they claimed precluded a damages award against them. Defendants also pointed to the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C.A. §§ 11101-11152 (Supp. 1994), as providing peer review groups and their members an immunity from damages. As to the state law claims, defendants argue that they have been statutorily immunized, *see* O.C.G.A. §§ 36-65-1 and -2 (Supp. 1993), from state antitrust liability.

Because matters outside the pleadings would necessarily be considered, the court elected to treat defendants' motion to dismiss as a summary judgment motion in accordance with Federal Rules of Civil Procedure ("FED.R.CIV.P.") 12(c) and 56. The court held the motion in abeyance, however, as the parties indicated that there was a realistic prospect of settlement. Consequently, plaintiff's responsive brief was not filed until September 1, 1994.

II. *UNDISPUTED MATERIAL FACTS*

When plaintiff filed his complaint in 1990, he was thirty-seven years of age. After graduating from Valdosta State College, plaintiff unsuccessfully applied to the Medical College of Georgia ("MCG"), the University of Florida Medical School, and Emory Medical School for a doctor of medicine ("M.D.") program. He then enrolled in and completed a one year course of study at MCG to become a physician's assistant. Plaintiff

then reapplied unsuccessfully to enter MCG's M.D. program. Only his subsequent application to the West Virginia College of Osteopathy, an osteopathic medical school, was accepted.

Plaintiff successfully matriculated for four years at the West Virginia College of Osteopathy earning a Doctor of Osteopathy ("D.O.") degree. He then completed a one year osteopathic internship at Memorial Hospital in York, Pennsylvania, and remained there to complete an osteopathic orthopedic surgical residency program. This rendered plaintiff eligible to take his osteopathic board exams. On August 9, 1990, counsel for plaintiff advised the court that plaintiff had just completed his "oral" osteopathic orthopedic exams, but had not yet received the results.

On September 20, 1986, plaintiff applied for orthopedic surgical staff privileges at SGMC. His application was duly considered and denied.[1] Defendants have testified that all actions taken by them were within the scope of their duties as staff, committee, or board members. Plaintiff nowhere alleges that any

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1. The final determination regarding extension or denial of staff privileges rests, in all cases, with the Authority itself. The various levels of committee review only generate "recommendations" for the Authority to act upon. By-Laws of the Medical Staff of South Georgia Medical Center, Article V, section 2. Furthermore, no adverse recommendation by any of the several peer review committees is final until ratified by the Authority, and the Authority will not consider a committee's recommendation until the affected practitioner "has exercised, or has been deemed to have waived, his/her right to an Appellate Review. . . ." *Id.;* Article XIII, sections 1-7. The Board members who govern the Authority, and in whose hands rests the *ultimate decision* regarding privileges, are "appointed by the governing body of the county or minicipal corporation of the area of operation. . . ." O.C.G.A. § 31-7-72(a) (1991 & Supp. 1994).

defendant acted outside the scope of his or her duty as a member of either the board or one of the various credentialing committees of defendant-Authority.

SGMC has adopted bylaws governing the application process for surgical privileges. Article X, section 2(b)(4) (special requirements of surgical service in orthopedics) requires applicants for staff orthopedic surgical privileges to "demonstrate by training, experience, and performance the requirements for eligibility in [the specialty of orthopedics] as designed by the American Board of Orthopedics and be either Board Certified or Board Eligible." By-Laws of the Medical Staff of the South Georgia Medical Center. The osteopathic orthopedic residency training program that plaintiff completed at Memorial Hospital was not approved by the American Board of Orthopedics; therefore, he was not eligible to become certified by the American Board of Orthopedics and did not meet the requirements of SGMC's bylaw provision. In describing the reason for the denial of privileges to plaintiff, Charles F. Hobby, M.D., stated: "[A]n applicant must . . . be either Board Certified or Board eligible. [Plaintiff] did not complete an approved residency training program, therefore, he was not eligible to become certified by the American Board of Orthopedics. [Plaintiff] did not meet the requirements of the SGMC By-Laws and, accordingly, he was not accepted for membership on the medical staff." (Hobby affidavit, at ¶ 13).[2]

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2. The American Board of Orthopaedic Surgery has established minimum educational goals that, if complied with, will allow a physician to be Board Certified in the field of orthopedics. Although the Board does not intend to "define requirements for membership in any organization or on the staff of any hospital," a hospital wishing to use the Board's criteria as its own may certainly do so. *See Silverstein v. Gwinnett Hosp. Authority*, 861 F.2d 1560 (11th Cir. 1988) (determining propriety, under equal protection

(Cont'd)

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Plaintiff does have orthopedic staff privileges at nearby Smith Hospital in Hahira, Georgia, and plaintiff's former osteopathic, orthopedic surgical partner, Dr. Gross, was able to attain surgical staff privileges at SGMC because his residency, approved by the American Board of Orthopedics, made him board eligible.

III. *CONCLUSIONS OF LAW*

A. Summary Judgment Based on an Immunity

This motion comes before the court in the context of a summary judgment motion. A grant of summary judgment is proper when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P.56(c). The substantive law identifies which facts are "material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "Material

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(Cont'd)
analysis, of conditioning the grant of orthopedic surgical staff privileges on "Board Certification" requirement). Indeed, SGMC requires that applicants for orthopedic surgical staff privileges be either "Board Certified or Board Eligible." In imposing this requirement, SGMC adopted as well the Board requirement that an applicant participate in an "orthopaedic surgery residency program" accredited by the Accreditation Council for Graduate Medical Education ("ACGME"). The Board's minimum educational requirements for post-graduate specialty training programs provide a yardstick by which to measure a physician's competence.

Plaintiff was aware of Board Certification, yet choose not to apply to an accredited orthopedic residency program that would have qualified him for it. Rather, plaintiff chose an osteopathic residency, one not accredited by the ACGME. Plaintiff is therefore currently ineligible for Board Certification.

facts" are those that, when disputed, "might affect the outcome of the suit under the governing law. . . ." *Id.* A dispute concerning a material fact is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

It is the movant who "bears the initial burden to show, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). When the movant has the burden of proof at trial, that party must carry its summary judgment burden by presenting evidence demonstrating that "on all the essential elements of its case . . ., no reasonable jury could find for the non-moving party." *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11th Cir. 1991) (en banc). If, and only if, the movant carries the initial burden, then the burden shifts to the nonmovant to demonstrate that a material issue of fact exists precluding summary judgment. *Clark*, 929 F.2d at 608.

With these standards and procedures in mind, the court notes that defendants have the initial burden, as it would be incumbent upon them at trial to establish the existence of the various immunities asserted by them. The substantive laws that defendants claim entitle them to summary judgment establish "immunities." Under *Anderson*, this court must refer to the substantive law of the *Parker v. Brown* "state action" doctrine, the LGAA, and the HCQIA in determining which facts are material. Plaintiff, however, has concentrated the majority of his efforts on creating "genuine issues of material fact" in relation to the underlying causes of action.[3] This endeavor is in vain;

3. For example, plaintiff maintains that defendants' proffered reason for denial of privileges — his inability to satisfy the standards of the American (Cont'd)

when addressing the legal question of whether an immunity exists, it is unnecessary for the court to ever reach the merits of the underlying cause of action.

The Supreme Court, in *Mitchell v. Forsyth*, 472 U.S. 511, 527-28, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985), demonstrated that "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." In determining whether the denial of *Harlow*-type qualified immunity to a defendant satisfied the "collateral order" doctrine, the Court stated:

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Board of Orthopedics — is false because such a board does not exist. If true, this would establish a genuine issue of fact material to plaintiff's underlying cause of action (antitrust violations).

However, since defendants' summary judgment motion is predicated upon one of several substantive bodies of law dealing with immunities, facts which are material under the substantive law governing plaintiff's causes of action are wholly irrelevant. A fact "material" to an antitrust cause of action may or may not be material to a claim of immunity under the state action exemption doctrine. *Cf. Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.

Plaintiff's affidavit containing the above-referenced asertion is stricken on account of its patent contradiction of statements made earlier by plaintiff, both in his letter to SGMC (dated December 19, 1986) and during his hearing before the Appellate Review Committee (transcript of Hearing on 7/14/87, at 47). Specifically, plaintiff avers in his affidavit of May 8, 1990 that the American Board of Orthopedics does not, and never has, existed. However, plaintiff's letter of December 19, 1986 to SGMC (attached as exhibit to transcript of Appellate Review Hearing), refers explicitly to the "American Academy of Orthopedics Certification Boards."

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> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the [prerequisites to the extension of immunity exist]. To be sure, the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief. . . .

Mitchell, 472 U.S. at 528, 105 S.Ct. at 2816 (footnote omitted). As an example of the factual inquiry necessitated by a claim of immunity, the Court described the process by which courts determine a congressman's immunity under the Speech and Debate Clause. A court must necessarily refer to the facts to determine whether the challenged actions fall within the protective scope of the asserted immunity. *Id.*

Similarly in this case the court need only analyze the facts insofar as it is necessary to determine whether defendants' challenged conduct falls within the scope of the immunities claimed by them. Whether or not defendants engaged in anticompetive conduct is entirely irrelevant — the question before the court is whether a genuine issue of material fact exists that would preclude the existence of one of the several immunities to which defendants claim they are entitled. Accordingly, the court will consider only those arguments which support or oppose a finding that genuine issues of material fact exist in regard to the general immunities professed by defendants.

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B. State Action Immunity Under *Parker v. Brown*

1. General Rules of Law

The formation of the "state action" doctrine has varied since it was first announced in *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Its evolution is due primarily to the changing nature of defendants in cases applying the immunity. Initially, it was the state (usually through a state department or agency) being sued as the bogeyman of competition. In cases such as these, where the state, its officers, or agents had engaged in anticompetitive conduct, the Court held in favor of immunity if the state was engaged in "activities directed by its legislature." *Parker,* 317 U.S. at 350-51, 63 S.Ct. at 313. The inquiry focused on whether the conduct was "an act of government by the State as sovereign." *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 409, 98 S.Ct. 1123, 1134-35, 55 L.Ed.2d 364 (1978) (citing *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975)). The effects repugnant to the forces of competition must have stemmed from "the state['s] command," the objective must have been "the execution of a governmental policy," and the state's role must have been essential. *City of Lafayette,* 435 U.S. at 409, 98 S.Ct. at 1134-35.

The rule was later restated in the context of a municipal defendant, a political subdivision of the state rather than the state itself: "[T]he Parker doctrine exempts only anti-competitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413, 98 S.Ct. at 1137. Because of the high probability that a municipality would impose anticompetitive

restraints to favor its own interests rather than the state's, the Court, in *City of Lafayette* created a two-pronged test for political subdivisions wishing to assert "state action" immunity. The Court felt that satisfying these two prongs would sufficiently establish a "state policy to displace competition with regulation or monopoly service" in the area over which the political subdivision had been given control. *Id.* First, the state must have "clearly articulated and affirmatively expressed as state policy" the anticompetitive restraint which was part of a comprehensive regulatory system. *Id.* at 410, 98 S.Ct. at 1135. Second, implementation of the "state's policy [must be] actively supervised." *Id.* at 415, 98 S.Ct. at 1138.

However, the "active supervision" requirement would later be eliminated from the test applied to political subdivisions, and only applied in cases involving purely private defendants. *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 46-47, 105 S.Ct. 1713, 1720-21, 85 L.Ed.2d (1985). Thus "state action" immunity was available to political subdivisions merely upon a showing of a clearly articulated and affirmatively expressed state policy to displace competition with regulation. *Id.* The Eleventh Circuit Court of Appeals, in a case involving a publicly owned and operated hospital's board of directors, interpreted *Hallie* as requiring the defendant board to make the following showings: "(1) that it is a political subdivision of the state; (2) that, through statutes, the state generally authorizes the political subdivision to perform the challenged action: and (3) that, through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct." *F.T.C. v. Hospital Bd. of Directors of Lee County,* 38 F.3d 1184, 1187-88 (11th Cir. 1994). That opinion goes on to explain the "clear articulation" test as requiring "that anticompetitive conduct is the *foreseeable* result of the legislation." *Lee County,* 38 F.3d at 1188 (emphasis supplied).

Moreover, "foreseeable" is not the equivalent of "inevitable" — the test of foreseeability only requires "that the anticompetitive conduct be reasonably anticipated, rather than the inevitable, ordinary, or routine outcome of a statute." *Lee County,* 38 F.3d at 1190-91.[4]

The next step came when states began authorizing "private parties," as opposed to its political subdivisions, to engage in anticompetitive behavior. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum,* 445 U.S. 97, 103, 100 S.Ct. 937, 942, 63 L.Ed.2d 233 91980), the state had enabled wine producers to "prevent price competition by dictating the prices charged by wholesalers." The dangers present in *City of Lafayette* — individual municipalities acting in favor of their own interests over those of the state — were even more pervasive in *Midcal,* where the state was empowering "private" persons to act selfishly in restraint of trade. Because the dangers inherent in extension of the "state action" exemption to political subdivisions and private persons were the same (differing only by degree), the Court chose to apply to purely private actors the same test as originally used for political subdivisions. First, "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.' " *Midcal,* 445 U.S. at 105, 100 S.Ct. at 943. And, second, "the policy must be 'actively supervised' by the State itself." *Id.* This second element has been interpreted to require that "the state exercise ultimate control over the challenged anticompetitive conduct." *Patrick v. Burget,* 486 U.S. 94, 101, 108 S.Ct. 1658, 1663, 100 L.Ed.2d 83 (1988). Whereas

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4. This is consistent with what has been identified as a general liberalization of the immunity as it applies to municipalities. *See Wall v. City of Athens, Ga.,* 663 F.Supp. 747, 751-55 (M.D. Ga. 1987) (Fitzpatrick, J.) (concluding *Hallie* broadened state action exemption for municipal defendants).

the second prong had been eliminated in the case of municipal defendants, *Hallie*, 471 U.S. at 46, 105 S.Ct. at 1720, the "active supervision" element became a precondition of state action immunity for purely private actors.

To summarize, where a *political subdivision of the state* is engaged in conduct challenged as anticompetitive, it will be entitled to the "state action" exemption upon a showing that it is authorized to act in an anticompetitive fashion pursuant to a "clearly articulated and affirmatively expressed" state policy. *Hallie*, 471 U.S. at 46, 105 S.Ct. at 1720; *Bolt v. Halifax Hosp. Medical Center*, 980 F.2d 1381, 1385-87 (11th Cir. 1993) (*Bolt IV*). In the Eleventh Circuit, this means that the anticompetitive behavior was a foreseeable, or reasonably anticipated, outgrowth of the statute empowering the defendant to act within a sphere of influence. *Lee County*, 38 F.3d at 1189.

Where the actor is a *private person*, the state action exemption is available if the state policy to replace competition with regulation is "clearly articulated and affirmatively expressed."[5] and the state actively supervises the conduct in question. *Hallie*, 471 U.S. at 46, 105 S.Ct. at 1720. "Active supervision" requires that the state "exercise ultimate control

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5. After *Midcal's* application of City of *Lafayette* to private parties, the Court confirmed the two-part test as being the same in both instances. *Hallie*, 471 U.S. at 39, 105 S.Ct. at 1717 ("[*Midcal*] applied the *Lafayette* two-pronged test to a case in which the state action exemption was claimed by a private party"). Therefore, in a case involving municipal and private defendants, both of whom engaged in the same challenged conduct, and both of whom operated under the same statutory authorization, satisfaction of the clear articulation element as to one would constitute satisfaction as to the other.

over the challenged anticompetitive conduct." *Patrick*, 486 U.S. at 101, 1098 S.Ct. at 1663.[6]

2. Does the Municipality or Private Person Test Apply to the Authority, its Board Members, and its Committee Members?

The next question is which of these two tests — political subdivision or private actor — will govern these defendants: the Authority, its Board Members, and the staff members who participated in the peer review activities. The Eleventh Circuit

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6. In *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1279-84 (11th Cir. 1988) (*Bolt I*), the Eleventh Circuit held that "active state supervision" existed where the courts of that state exhibited a willingness to conduct a sufficiently probing judicial review of staff privileges decisions. Specifically, courts in Florida "sufficiently probed" staff privileges decisions by ensuring procedures employed in peer review and credentialing were fair, assessing the validity of the criteria used by hospitals, judging the sufficiency of evidence, and offering injunctive relief. *Bold I*, 851 F.2d at 1283-84.

However, the Eleventh Circuit granted a request for rehearing en banc on the issue of "active state supervision" in light of the interpretation given that requirement by *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988) (state must "exercise ultimate control over the challenged anticompetitive conduct"). *Bolt v. Halifax Hosp. Medical Center*, 861 F.2d 1233 (11th Cir. 1988). But because the appellee hospitals and their medical staffs withdrew claims of immunity under the state action exemption at oral argument, the en banc court never reached that question. *Bolt v. Halifax Hosp. Medical Center*, 874 F.2d 755, 756 (11th Cir. 1989) (*Bolt II*). The decision in *Bolt I* was reinstated, except for that portion dealing with the state action exemption, which was vacated. *Id.* Thus courts in the Eleventh Circuit are left with little guidance on the "active supervision" inquiry in the context of peer review decisions by a municipal hospital and its medical staff.

has found numerous authorities to be political subdivisions of the states that have created them. For example, in *Lee County* the defendant-Board was a political subdivision of the state simply because it was "a healthcare authority created by the Florida Legislature as a special purpose unit of local government." *Lee County,* 38 F.3d at 1188. And it is unlikely that any legal distinction exists for purposes of state action immunity between municipalities and other types of political subdivisions (such as authorities). *Askew v. DCH Regional Health Care Authority,* 995 F.2d 1033, 1037 (11th Cir.), *cert. denied,* __U.S. __, 114 S.Ct. 603, 126 L.Ed.2d 568 (1993) (cataloging various district court and appellate opinions finding state-created authorities to be municipalities for purpose of *Hallie* test). Like the hospital authority in *Sweeney v. Athens Regional Medical Center,* 705 F.Supp. 1556, 1565 (M.D.Ga. 1989), the Authority here "is clearly a municipality for purposes of state action exemption."[7] *See also Bolt v. Halifax Hosp. Medical Center,* 980

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7. The statute in which defendant-Authority has its genesis is O.C.G.A. § 31-7-72(a) (1991 & Supp. 1944), which states:

> There is created in and for each county and municipal corporation of the state a public body corporate and politic to be know as the "hospital authority" of such county or city, which shall consist of a board of not less than five nor more than nine members to be appointed by the governing body of the county or municipal corporation of the area of operation for staggered terms as specified by resolution of the governing body. * * * No authority created under this Code section shall transact any business or exercise any powers under this Code section until the governing body of the area of operation shall, by proper resolutuion, declare that there is need for an authority to function in such county or municipal corporation.

(Cont'd)

F.2d 1381, 1385-87 (11th Cir. 1993) (*Bolt IV*) (state-created hospital authority in Florida held to be a political subdivision entitled to immunity if it meets *Hallie* test). Accordingly, the Authority and its Board Members are entitled to application of the single-element *Hallie* test.

The question thus remains, "which test is to be applied to the staff members who served on the Authority's various peer review committees?" The Fourth Circuit Court of Appeals has held that medical staff members of a municipally owned and operated hospital, when "making their recommendation to deny privileges," act as agents of that hospital for purposes of the state action exemption doctrine; therefore, the immunity of such medical staff members, like the municipal hospital with which they are affiliated, is evaluated under *Hallie*. *Cohn v. Bond,* 953 F.2d 154, 158 (4th Cir. 1991), *cert. denied,* __ U.S. __, 112 S.Ct. 3057, 112 L.Ed.2d 922 (1992).

In *Cohn,* plaintiff-chiropractor appealed the district court's determination that staff members of a municipally owned and operated hospital, who recommended denial of privileges to him, were immune under the *Hallie* test for state action immunity. The Fourth Circuit recognized that whether the staff members would be required to satisfy the dual element *Midcal* formulation depended upon whether the staff members were employees or private parties. In this regard, the court found:

(Cont'd)

Taken in conjunction with O.C.G.A. § 31-7-75 (1991) (listing powers and functions of hospital authorities), this statute convinces the court that hospital authorities in Georgia are entitled to treatment as political subdivisions for purposes of federal antitrust laws.

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> [W]hen members of the medical staff recommend action on an application for privileges, as authorized by the municipal hospital, they are acting in their capacity as employees, as opposed to private parties. Physicians who make peer review decisions at the behest of, or by delegation from, the hospital's board of trustees, are acting as agents of the hospital and are, therefore, indistinguishable from the hospital.

Cohen, 953 F.2d at 157-58. Because the hospital's conduct was immunized under *Hallie*, the staff members enjoyed state action immunity as well.

It is important, however, to address seemingly contradictory authority. In discussing whether allegations that a hospital and its medical staff had "conspired" together stated a claim under section 1 of the Sherman Act, 15 U.S.C.A. § 1, the Eleventh Circuit found that "[a] hospital and the members of its medical staff . . . are legally separate entities. . . ." *Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810, 819 (11th Cir. 1990) (*Bolt III*), *vacated and remanded*, 980 F.2d 1381, 1387 (11th Cir. 1993) (*Bolt IV*). However, as that case's subsequent history indicates, this finding has no precedential value. *See infra*, note 9.

Even is *Bolt IV* did not vacate that portion of *Bolt III* holding that "a hospital and the members of its medical staff . . . are all legally separate entities," the analysis in *Cohn* is not weakened by it. *Cohn* found that in the context of peer review activities, the medical staff defendants had acted as agents of the municipal hospital. *Bold III* only held that a hospital and its medical staff were "legally capable of" conspiracy because of the legal

distinction which existed between the two, not that they did in fact conspire in all instances. Thus, *Bolt III's* holding did not foreclose the possibility that in some cases staff members might serve as agents or the hospital which they served.

In this case, the court finds that the individual staff members acted as agents of the authority at all times. This is not to say that in all cases staff physicians will be agents of the hospitals where they conduct peer review. Both *Cohn* and *Bolt III* allow for instances when the staff members are agents of their hospital authority and for instances when they are not. The court finds that this particular case provides one of the instances where staff members are agents of the authority at whose behest they conduct peer review activities.

Accordingly, the staff members' immunity under the state action exemption is to be analyzed under *Hallie,* along with the Authority and its Board Members.

3. It is Georgia's Policy to Displace Competition with Regulation?

The Eleventh Circuit has issued at least three relevant decisions dealing with antitrust challenges to a public hospital authority's actions. The question common to each was whether a state's statutory scheme "reasonably anticipated" a particular kind of conduct which, when engaged in by a political subdivision, had anticompetitive results. The specific question for consideration here is whether Georgia's Hospital Authorities Law, along with other ancillary statutes, "reasonably anticipated" that local hospital authorities would act, based on the recommendations of their peer review committees, in an anticompetitive fashion when granting or denying surgical staff privileges.

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In *Bolt v. Halifax Hosp. Medical Center,* 891 F.2d 810 (11th Cir. 1990) (*Bolt III*), *rev'd on other grounds,* 980 F.2d 1381 (11th Cir. 1993), the Eleventh Circuit was called upon to determine whether a special taxing district of the State of Florida, charged with the responsibility for operating a local hospital,[8] was entitled to immunity as a municipality under the "state action" exemption. The challenged action was the denial of staff privileges to the plaintiff-physician.

Once the court of appeals concluded that the defendant-hospital was entitled to application of the single-element, municipality test announced in *Hallie,* the court proceeded to conduct an analysis of Florida's legislative grant of power to the hospital. The examination's purpose was to determine whether the challenged action was taken "pursuant to a clearly expressed state policy" to act anticompetitively. *Bolt III,* 891 F.2d at 825. The "foreseeability of anticompetitive conduct" was the gauge by which to measure the clarity of the Florida legislature's "expression." Because the anticompetitive conduct was "authorized peer review in licensed medical facilities," the court referred to FLA.STAT. § 395.011(6), (7) (1987) (current version at FLA.STAT. § 395.0191 (1993)):

> (5) The governing board of each licensed facility shall set standards and procedures to be applied by the licensed facility and its medical staff in considering and acting upon applications for staff membership or clinical privileges. These standards and procedures shall be available for public inspection.

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8. The court treated the special taxing district and the hospital as a single entity for purposes of the "state action" exemption. *Bolt III,* 891 F.2d at 813 n.1.

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> (6) Upon the written request of the applicant, any licensed facility that has denied staff membership or clinical privileges to any applicant specified in subsection (1) or subsection (2) shall, within 30 days of such request, provide the applicant with the reasons for such denial in writing. A denial of staff privileges to any applicant shall be submitted, in writing, to the applicant's respective licensing board.

The court found that this legislative grant made it foreseeable that the hospital "would rely on *recommendations made by a physician's peers* and refuse to deal with (i.e., boycott) that physician." *Bolt III*, 891 F.2d at 825 (emphasis supplied).[9] Accordingly, "the Florida legislature clearly articulated a policy to displace competition, at least to the extent that [a hospital] decision not to hire a physician can be considered a boycott." *Id.*

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9. The court further held that Florida's enabling legislation did not foresee a "conspiracy" between the hospital and its peer review committee, so that the hospital was not shielded under *Hallie* to the extent that it had "conspired" to deny plaintiff privleges. *Bolt III*, 891 F.2d at 825. However, the Supreme Court's decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), caused the Eleventh Circuit to rethink this position. Three years later, in *Bolt v. Halifax Hosp. Medical Center*, 980 F.2d 1381 (11th Cir. 1993) (*Bolt IV*), the Eleventh Circuit reversed *Bolt III* insofar as it denied application of *Hallie* on account of underlying allegations of conspiracy between the hospital and its staff. Inquiring into whether a conspiracy existed was improper in construing the availability of state action immunity for a public hospital. *Bolt IV*, 980 F.2d at 1387-89. *Bolt III*, moreover, remains good law to the extent that it finds Florida's legislation as foreseeably authorizing anticompetitive conduct in the area of peer reivew.

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The Eleventh Circuit has also examined other actions in which publicly owned and operated hospitals have engaged to determine if their anticompetitive nature was a foreseeable result of enabling legislation. In *Askew v. DCH Regional Health Care Auth.*, 995 F.2d 1033 (11th Cir.), *cert. denied*, __ U.S. __, 114 S.Ct. 603, 126 L.Ed.2d 568 (1993), a state-created, public health care authority's bid to acquire a private health care facility was challenged as anticompetitive. After discounting plaintiff's argument that defendant-authority was not entitled to application of the *Hallie* test when acting "like a private party," the Eleventh Circuit proceeded to determine whether the Alabama legislature's grant of power, which enabled the defendant-authority to acquire health care facilities,[10] made it foreesable that such acquisitions would have anticompetitive results. The court noted that the Alabama legislature had directed health care authorities to act to the fullest extent of their powers, " 'notwithstanding that as a consequence of such exercise of such powers[,] it engages in activities that may be deemed "anticompetitive" within the contemplation of the antitrust laws of the state or of the United States.' " *Askew*, 995 F.2d at 1040 (quoting ALA.CODE § 22-21-318(a)(31)) (alteration in original). This "explicit recognition of the potential anticompetitive results" exceeded *Hallie's* foreseeability requirement; therefore, the defendant-authority's

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10. A subsidiary dispute in *Askew*, not present in this case, was whether Alabama's Health Care Authorities Act of 1982, ALA.CODE § 22-21-310 *et seq.*, authorized the conduct in question. The court in *Askew* decided that the statute did permit the contemplated acquisition, and then continued to determine whether the anticompetitive effects of such an acquisition were foreseeable.

In this case, the parties do not dispute the power of the defendants to conduct peer review activities. Georgia's Hospital Authorities Law does contemplate and provide for such activities.

proposed acquisition could not render it liable under federal antitrust laws.

Finally, the Eleventh Circuit was most recently called upon to re-examine, in the context of Florida law, the issue decided in *Askew:* whether it was foreseeable that a state-created hospital authority would act anticompetitively in acquiring other hospitals. *F.T.C. v. Hospital Bd. of Directors of Lee County,* 38 F.3d 1184, 1190 (11th Cir. 1994). Despite the fact that Florida's legislature had not made a pronouncement as explicit as that contained in ALA.CODE § 22-21-318(a)(31) (directive to act notwithstanding anticompetive effects), the court still found the proposed acquisition entitled to immunity from antitrust liability.

Stressing that the explicit authorization found in *Askew* "went well beyond what was required in order to render those results foreseeable," the court found that foreseeability only required anticompetitive effects to be a "reasonably anticipated" result of the enabling legislation. *Lee County,* 38 F.3d at 1190, 1191. Anticompetitive outcomes need not be "the inevitable, or even the routine or ordinary result of the power" specifically granted an authority; therefore, "broad and expansive" grants of power " 'within a specified field and for a particular purpose' . . . 'may be fairly construed to contemplate that [an authority] might displace competition in [a specific product market].' " *Lee County,* 38 F.3d at 1190 (quoting *Central Florida Clinic for Rehabilitation, Inc. v. Citrus County Hospital Bd.,* 738 F.Supp. 459, 464 (M.D. Fla.), *aff'd without opinion,* 888 F.2d 1396 (11th Cir. 1989), *cert. denied,* 495 U.S. 947, 110 S.Ct. 2207, 109 L.Ed.2d 533 (1990)).

This court in *Sweeney v. Athens Regional Medical Center,* 705 F.Supp. 1556, 1563 (M.D.Ga. 1989), conducted a detailed

analysis of Georgia's statutory scheme authorizing the creation of hospital authorities and the concomitant ability to conduct peer review and credentialing activities. The conclusion there was that Georgia's legislature made it foreseeable that hospital authorities would act in an anticompetitive manner in conducting peer review activities. One of the statues relied upon by *Sweeney* was O.C.G.A. § 31-7-7, a provision establishing standards and procedures for the refusal or revocation of staff privileges by a publicly owned and operated hospital:

> Whenever any . . . doctor of osteopathic medicine . . . shall make application for permission to treat patients in any hospital owned and operated by the state, any political subdivision thereof, or any municipality, the hospital shall act in a nondiscriminatory manner upon such application . . . considering the applicant on the basis of the applicant's demonstrated training, experience, competence, and availability and reasonable objectives, including, but not limited to, the *appropriate utilization of hospital facilities* . . . .

(emphasis supplied). *Accord Bolt v. Halifax Hosp. Medical Center,* 980 F.2d 1381, 1395 (11th Cir. 1993) (Clark, J., dissenting) (*Bolt IV*); *Coastal Neuro-Psychiatric Associates, P.A. v. Onslow Memorial Hospital,* 795 F.2d 340 (4th Cir. 1986) (determining foreseeability in context of North Carolina statute based on "appropriate utilization of hospital facilities"). It is at the very least forseeable, and most certainly reasonably anticipated, that this language would enable a hospital authority to engage in anticompetitive conduct through its peer review

activities. The Georgia legislature could have foreseen, or at least reasonably anticipated, that authorities would consider the number of market participants in determining the "appropriate utilization of hospital facilities."

Other statutes that support this conclusion also demonstrate that it was certainly foreseen that a hospital authority's staff members, when serving on a peer review or medical review committee, would potentially act anticompetitively in making recommendations to the authority. The Georgia legislature's intent is to "provide protection for those individuals who are members of peer review groups which evaluate the quality and efficiency of professional health care providers and to protect the confidentiality of their records." O.C.G.A. § 31-7-130 (1991). One specific protection shields "professional health care providers" from all criminal or civil liability, under any law, for their participation in "peer review activities." *Id.* § 31-7-132 (1991). Similar protections exist for members of "medical review committees." *Id.* §§ 31-7-140 to -143 (1991). Finally, it is the policy of the State of Georgia to confer antitrust immunity on local governing authorities "in the exercise of powers specifically granted to them by law. . . ." *Id.* §§ 36-65-1 and -2 (1993). The Authority in this case qualifies as such an authority, *id.* §§ 31-7-70 to -96 (Hospital Authorities Law), and the committee members qualify as agents thereof. *Cohn,* 953 F.2d at 158.

Notwithstanding the foregoing, plaintiff argues that it cannot be the policy of Georgia to displace competition with regulation in this area. Article III, § 6, ¶ 5 of the Georgia Constitution of 1983 contains a prohibition against legislative authorization of contracts or agreements that defeat or lessen competition, or encourage monopolization. Plaintiff argues that this constitutional provision renders inoperative any such

authorization that might be contained in the above-referenced statutes. Indeed, this prohibition does extend to governmental units receiving their power to monopolize from the state legislature, and has been used to strike down such laws. *Jackson & Coker, Inc. v. Hart,* 261 Ga. 371, 405 S.E.2d 253 (1991) (striking down O.C.G.A. § 13-8-2.1 as unconstitutional). This constitutional argument is the linchpin of plaintiff's brief in opposition. If the delegation of anticompetitive powers through the Hospital Authorities Law and ancillary statutes violates Georgia's state constitution, then it can hardly be said that it is the policy of Georgia to displace competition with regulation. The court thus proceeds to analyze Georgia policy in light of plaintiff's contention.

The question essentially is whether Georgia has begun to literally apply this constitutional prohibition or whether its application remains tempered by the "rule of reason," followed for many years by the Georgia courts. In matters concerning allegations of restraint of trade, Georgia has generally followed the "rule of reason." This court-created rule "protects those contracts which are reasonable in light of the interests of the parties and the interest of the public." *Ferrero v. Associated Materials, Inc.* 923 F.2d 1441, 1447 (11th Cir. 1991). Application of this rule has narrowed an otherwise overbroad constitutional prohibition. *Id.*

Plaintiff, however, cites *Jackson & Coker, Inc. v. Hart,* 261 Ga. 371, 405 S.E.2d 253 (1991), for the proposition that Georgia no longer follows the "rule of reason," but instead literally applies the constitutional prohibition in Art. III, § 6, ¶ 5. At issue in that case was a statute calling for the enforcement of "every contract in partial restraint of trade that is not against the policy of the law or otherwise unlawful." O.C.G.A. § 13-8-2.1(g)(1) (Supp.

1994). However, the "rule of reason" was not the standard by which courts were to determine the "policy of the law." Rather, the statutory standard mandated the enforcement of contracts, "not so much against the 'policy of the law' as to be '*unconscionable.*' " *Jackson & Coker,* 405 S.E.2d at 255 (emphasis supplied). The possibility thus existed for courts to uphold contracts even though they were "against the policy of the law," thereby "breath[ing] life into contracts otherwise plainly void."[11]

The Georgia Supreme Court could not have meant to abandon the "rule of reason" through its opinion in *Jackson & Coker, Inc.* especially since the majority did not mention the rule once. Moreover, the statute was plainly not a codification of the "rule of reason," and indeed went considerably beyond that rule in permitting contracts or agreements restrictive of trade. It seems unlikely that Georgia would implicitly overrule a doctrine followed by its courts for decades. This seems especially so when the rule itself was not even before the court. Doctrines such as the "rule of reason" traditionally go out with a bang, not a whimper. In this court's considered judgment, the "rule of reason" still governs in Georgia.

Courts in Georgia realized long ago, in *State v. Central Ry. Co.,* 109 Ga. 716, 726, 35 S.E. 37 (1899), that certain restraints

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11. The question arises: which contracts were those that were "otherwise plainly void"? The reference can only be to those contracts found void under the "rule of reason." Although a contract be unreasonable, and thus void under the "rule of reason," it might nevertheless satisfy the standard of conscionability, and thus be enforced under the statute. What the Georgia Supreme Court is apparently taking issue with is the lowered standard of enforceability for contracts restrictive of trade. *See Jackson & Coker, Inc.,* 405 S.E.2d at 255 (Clark, C.J., dissenting).

of trade could be beneficial, and were at times even necessary: "[I]t may even be beneficial to the public that a particular place should not be overstocked with persons engaged in the same business." That same observation holds true today.[12] And because the rules of construction in Georgia require a law to be construed as constitutionally valid if possible, *Lasseter v. Georgia Public Serv. Comm'n,* 253 Ga. 227, 319 S.E.2d 824, 828 (1984), the court holds that the delegation by the state legislature, either explicitly or implicitly, of the power to engage in peer review activities that are restrictive of trade satisfies the "rule of reason" in these circumstances. The delegation is therefore valid under the Georgia Constitution.

The Authority, its Board Members, and the staff members serving on its various committees are absolutely immune from suit under the state action exemption of *Hallie.* The court — in light of the decisions in *Bolt III, Askew, Lee County,* and *Sweeney,* and the statutory scheme adopted by Georgia — finds that the State of Georgia has clearly and affirmatively articulated a policy to displace competition with regulation in regard to peer review activities conducted by publicly owned hospitals. Furthermore, the staff members acted "as agent of [the Authority] in making their recommendation to deny privileges." *Cohn,* 953 F.2d at 158.[13] Therefore, summary judgment is **GRANTED** as to all defendants.

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12. It would seem that the balance struck at hospitals by granting and denying privileges is similar to the agreement among tenants at a shopping center to maintain a certain tenant mix. If those tenants have one shoe store among them, they may forbid the lease of additional space to other shoe merchants. This is because it is necessary for the survival of the shopping center as a whole to be able to maintain a diversified mix, with no trade or specialty represented by more merchants than there are clients to serve. Faced with a unique situation, maintaining the proper tenant mix is a "reasonable response."

13. Even if *Midcal's* dual element test was applied to the staff members (Cont'd)

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C. Immunity Under the Local Government Antitrust Act.

Even if *Hallie* did not provide defendants with an absolute immunity from suit, they would have been shielded from money damages by the LGAA, an act designed for lawsuits such as plaintiff's. Under the LGAA, a defendant must first be either a "local government" or a "person" as those terms are defined at 15 U.S.C.A. §§ 34(1), (2) (Supp. 1994). Second, the defendant, either a "person" or "local government," must be sued on the basis of action taken in "an official capacity."

The staff members serving on the Authority's various committees are "persons." The Authority and its Board Members fall within the scope of the term "local government" as a "special function governmental unit established by state law." 15 U.S.C.A. § 34(1)(B) (Supp. 1994). *See supra* note 7; *see also Sweeney,* 705 F.Supp. at 1561-62 (application of LGAA to hospital authorities in Georgia). Having established that the defendants are covered by the LGAA, all the court need determine is that

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(Cont'd)

as "private actors," the result would be the same in this case — the staff members recommendations were ultimately subject to ratificatiion by the Board, a group appointed by the local governing body. *Patrick*, 486 U.S. at 101, 108 S.Ct. at 1663. Because it is the appointees of the local governing body who "exercise ultimate control over the challenged anticompetitive conduct," the State of Georgia provides "active supervision" as required under *Midcal* and *Patrick. See also supra* notes 1 and 5.

The ineradicable distinction between *Patrick* and this case is the nature of the hospital involved. In the former, the hospital was apparently a private one, whereas in the latter the hospital is a political subdivision of the state that created it. The Fourth Circuit also seems to have distinguished *Patrick's* holding on this basis. *See Cohn,* 953 F.2d at 158 (citing *Patrick*).

the defendants were acting within the scope of their defined duties. As the undisputed facts make clear, all defendants acted within the scope of their duties, and as such are immune from "damages, interest on damages, costs, or attorney's fees. . . ." 15 U.S.C.A. §§ 35(a), 36(a) (Supp. 1994). Defendants' motion for summary judgment on the basis of the LGAA is likewise **GRANTED**, so that even if defendants had not been immunized under the state action exemption, plaintiff would have been foreclosed from seeking monetary damages.

D. Immunity Under the Health Care Quality Improvement Act

Defendants raise as their final federally generated immunity the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C.A. §§ 11101-11152 (Supp. 1994). Under the HCQIA, most persons affiliated with a "professional review action" — the professional review body, any person under contract with the body, and any person participating or assisting the body with respect to the review action — are immunized from liability for damages under most federal and state[14] laws, including antitrust laws. *Id.* § 11111(a)(1); *Bryan v. James E. Holmes Medical*

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14. Section 11111(c)(1) provides that, in regard to state-based causes of action, states may opt-in prior to the October 14, 1989, effective date. The effective date pertains to the date on which a complaint was "filed", not the date(s) on which a cause of action arose. Plaintiff claims that this effective date means no immunity exists for federal causes of action accuring prior to that date. That is an incorrect assertion.

This section simply allows States to render HCQIA immunity retroactive for causes of action based upon their laws. Defendants protected by the HCQIA are immune from liability for damages based on federal causes of action accruing on or after the act's effective date.

Center, 33 F.3d 1318, 1322 n.4 (11th Cir. 1994). The existence of HCQIA immunity, like qualified immunity under 42 U.S.C. § 1983, is properly determined at the summary judgment stage. *Bryan,* 33 F.3d at 1332-33 & n. 26. However, if there is a factual question on which the existence of the immunity is dependent, then an award of summary judgment on the basis of HCQIA immunity must be postponed until, or after, trial. *Id.* at 1333. The "subsidiary factual questions" controlling the existence *vel non* of the immunity should be submitted to the jury by means of special interrogatories: but in no case should the jury be asked to decide the ultimate question of defendants' immunity from damages under HCQIA. *Id.*

If a "professional review action" occurs, then those participating in it are immunized from damages. 42 U.S.C.A. § 11111(a)(1) (Supp.1994) A "professional review action" is defined as:

> an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such terms includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities

> relating to a professional review action. In this chapter, an action is not considered to be based on the competence or professional conduct of a physician if the action is primarily based on — (A) the physician's association, or lack of association, with a professional society or association, (B) the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business, (C) the physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis, (D) a physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional, or (e) any other matter that does not relate to the competence or professional conduct of a physician.

Id. § 11151(9). If a challenged action falls within this definition, it still must satisfy four preconditions listed in § 11112(a) before it will receive protection under § 11111(a)(1). The four conditions listed in § 11112(a)(1-4) are as follows: (1) the action was taken in the reasonable belief that it furthered quality health care; (2) the action was taken after a reasonable effort to obtain the facts of the matter; (3) adequate notice and hearing are provided to the physician; and (4) the action was warranted by the facts.

Furthermore, § 11112(a) initially creates a rebuttable presumption, in favor of the party claiming the immunity, that these four prerequisites have been met: "A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence." *Id.* § 11112(a); *Bryan,* 33 F.3d at 1323. Thus the party challenging the review action bears the burden to show, by a preponderance of the evidence, that at least one of the four conditions listed in § 11112(a)(1-4) has not been met. If the aggrieved party does not satisfy this burden, then a review action worthy of HCQIA protection will be deemed to have occurred.

Defendants' recommendation to deny (or ultimate denial of in the case of defendant-Authority) orthopedic surgical staff privileges to this osteopathic doctor occurred during the course of a "professional review action." The grounds for denial were plaintiff's failure, or simple inability, to become Board Certified, a common requirement imposed upon physicians to insure that uniform standards of training, experience, and performance have been met.[15] As indicated in the undisputed facts, the Bylaws of

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15. As an aside, the court notes that "Board Certified" or "Board Eligible" requirements are a rational basis, under a constitutional equal protection analysis, on which to condition the grant of staff privileges:

> The recognized distinctions between osteopathic and allopathic postgraduate specialty training provide a rational basis for [a hospital authority] to decide to restrict its medical Staff to licensed physicians, who have completed [Accreditation Council for Graduate Medical Education]-accredited postgraduate programs and are certified by an American Specialty Board, for the legitimate purpose of assuring and standardizing quality health care.

(Cont'd)

SGMC contain a provision that requires applicants for staff orthopedic surgical privileges to "demonstrate by training, experience, and performance the requirements for eligibility in [the specialty of orthopedics] as designated by the American Board of Orthopedics and be either Board Certified or Board Eligible.[16] Because Board Certification is an explicit requirement, the Bylaws require the various review committees to consider, when making a recommendation concerning privileges, the type of residency program in which an applicant has participated.[17] And it was the professional judgment of the various review committees that, in light SGMC's Bylaw provision, participation in an osteopathic residency was not the equivalent of an ACGME-accredited residency program. Defendants concluded that plaintiff's nonparticipation in an ACGME-approved residency program spoke directly to his level of competence in the specialty in which he sought privileges (orthopedic surgery). Accordingly, the decision to recommend denial of surgical privileges, and the ultimate denial by the Authority, were "professional review actions" presumptively entitled to HCQIA immunity.

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Silverstein v. Gwinnett Hosp. Authority, 861 F.2d 1560, 1565 (11th Cir.1988) (denial of staff privileges to osteopathic physicians). One defendant in *Silverstein* was an osteopathic orthopedic surgeon. *See also supra* note 2.

16. Plaintiff has disputed the ability to be "Board Eligible" as that term is used in the Authority's Bylaws. Such a status, although not explicitly recognized by the American Board of Orthopedics, was obviously meant to be a shorthand way of describing the requisite credentials for applicants who, not having practiced long enough to be "certified," would sit for the Board's certification exams once they had been in practice long enough.

17 As memtioned above, Board Certification entails participation in an ACGME-accredited residency training program. *Supra* note 2.

Because the court finds that a "professional review action" occurred, a presumption is created in defendants' favor that HCQIA immunity exists. It is now incumbent upon plaintiff to adduce evidence sufficient (a preponderance) to rebut this. Plaintiff has not met this burden. The only contentions raised by plaintiff that might be construed as rebutting this presumption deal with the fact that direct economic competitors were involved in the review process, and that during the Ad Hoc committee hearing on May 7, 1987, plaintiff was not allowed to have counsel present. *See* 42 U.S.C.A. § 11112(a)(3) (adequate notice and hearing). However, plaintiff was afforded counsel at the Appellate Review hearing held on July 14, 1987. Plaintiff's only evidence supporting the absence of adequate notice and hearing, therefore, is the fact that direct economic competitors were involved in the review process. This one shred of evidence is wholly insufficient to demonstrate that the hearings and notice provided plaintiff were unfair. *See Bryan,* 33 F.3d at 1336.

But plaintiff argues that §§ 11112(b)(3)(A)(ii) and 11112(b)(3)(C)(i) mandate a finding that adequate notice and hearing did not occur. Those sections are part of a larger laundry list of requirements that, if satisfied, establish a "safe harbor" for defendants seeking to provide adequate notice and hearing. There is no need for a court to reach the list of "suggestions" where a plaintiff fails to overcome the initial presumption established by § 11112(a).

Nevertheless, plaintiff here has misinterpreted the "suggestions" contained in § 11112(b) as the *sine qua non* for satisfaction of § 11112(a)(3). As both the statute and the court in *Bryan* make clear, however, "[a] professional review body's failure to meet the conditions described in [§ 11112(b)] shall not, in itself, constitute failure to meet the standards of

[§ 11112(a)(3)]." Indeed, "[i]f other procedures are followed, but are not precisely of the character spelled out in [section 11112(b)], test of 'adequacy' may still be met under other prevailing law." *Bryan*, 33 F.3d at 1336 (citation omitted). The only effect of the allegations made through plaintiff's argument — that hearing officers were in direct competition with him and that he was prevented from having counsel at a hearing — would have been to preclude defendants' reliance upon § 11112(b) as a means for creating a presumption of compliance with § 11112(a)(3). Because plaintiff has not succeeded in overcoming the statutory presumption of immunity, defendants are shielded from damages liability under HCQIA.

Although the issue of HCQIA immunity has been disposed of for purposes of this motion, the court feels compelled to address the additional, erroneous HCQIA arguments advanced by plaintiff. Plaintiff contends that § 11111(c) provides an effective date after the events occurred in this case and that the immunity extends only to "reporting" of information. The first argument, concerning effective dates, has been addressed above. *See supra* note 14. The other argument is indefensible. *See Bryan*, 33 F.3d at 1334 (revocation of staff privileges qualifies as professional review action, and thus within purview of statute).

Defendants' motion for summary judgment on the basis of the HCQIA is GRANTED.

E. State Antitrust Claims

Because the court has determined that defendants are immune from all federal claims, via the state action exemption, the only claims before the court are based on state antitrust laws. Under 28 U.S.C. § 1367(c)(3), this court declines to continue

the exercise of supplemental jurisdiction over these state-based claims. *Capital Imaging v. Mohawk Valley Medical,* 791 F.Supp. 956, 968 (N.D.N.Y.1992), *aff'd,* 996 F.2d 537 (2d Cir.1993). Plaintiff's state-based claims are, accordingly, **DISMISSED.**

IV. CONCLUSION

Defendants are absolutely immune from antitrust due to the state action exemption. Alternatively, defendants are immune from antitrust liability for money damages by reason of either the LGAA or the HCQIA. Their motion for summary judgment is therefore **GRANTED**. All pendent state-based claims are **DISMISSED.**

SO ORDERED.

APPENDIX C — RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Georgia Constitution Act 3 § 6 ¶ V(c)

Paragraph V. Specific limitations.

* * *

(c) The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void.

* * *

Georgia Codes

20-3-475. Legislative intent.

The General Assembly finds that at times areas of the state have an inadequate supply of persons who are licensed to practice primary care medicine. It is the purpose of this subpart to increase the number of Georgia resident students who enroll in out-of-state colleges of osteopathic medicine in the hope that a substantial portion of that number will, following graduation, return to Georgia and practice primary care medicine in an approved medically underserved area of the state or approved hospital or facility and thereby provide an increased level of primary medical care available to the people of this state. (Code 1981, § 20-3-475, enacted by Ga. L. 1985, p. 450, § 1.)

Appendix C

20-3-476. Authorization and administration of loan program; agreements with colleges of osteopathic medicine; maximum amounts of loans; cancellation of loans by practice in medically underserved area.

(a) To the extent provided for by the General Assembly in annual appropriations Acts, the authority is authorized under this subpart to make service cancelable education loans to residents of Georgia who are enrolled or accepted for enrollment in colleges of osteopathic medicine located within the United States, provided the college is accredited or provisionally accredited by the Bureau of Professional Education of the American Osteopathic Association and that graduates from the program of medical education in the college are eligible to apply for licensure by the Composite State Board of Medical Examines.

(b) The authority is authorized to enter into agreements with such colleges as may be appropriate to accomplish the purposes of this subpart, including, without limitation, agreements whereby a college will hold open one or more admission places for qualified Georgia residents who may be selected to receive a cancelable loan under this subpart.

(c) The osteopathic medical loan program shall be administered by the authority in accordance with this subpart and reasonable rules, regulations, and procedures established by the authority. Without limiting the generality of the foregoing, the authority is authorized to establish applicant eligibility and priority requirements, require a personal interview with applicants, determine individual loan amounts, and determine the apparent ability, character, and qualifications of

applicants and their fitness to become recipients of a loan, including consideration of their home area in Georgia and the likelihood, if determinable, that they will return and practice their profession in an area or at a site in Georgia that will likely enable them to repay their loans in services. The amount of loan made to an applicant shall not exceed the applicant's need for financial assistance as determined by the authority. The authority is authorized to give preference among qualified applicants to those who appear to be least able to pay costs associated with attendance at college.

* * *

20-3-512. Powers as to medical student loans and scholarships.

(a) It shall be the duty of the State Medical Education Board to receive and pass upon, allow or disallow all applications for loans made to or scholarships given students who are bona fide citizens and residents of the State of Georgia and who desire to become doctors of medicine and who are acceptable for enrollment in an accredited four-year medical school in the United States which has received accreditation or provisional accreditation by the Liaison Committee on Medical Education of the American Medical Association or the Bureau of Professional Education of the American Osteopathic Association for a program in medical education designed to qualify the graduate for licensure by the Composite State Board of Medical Examiners of Georgia. The purpose of such loans shall be to enable such applicants to obtain a standard four-year medical education which will qualify them to become licensed to practice medicine in the State of Georgia. It shall be the duty of the State Medical Education Board to make a careful and full

investigation of the ability, character, and qualifications of each applicant and determine the applicant's fitness to become the recipient of such loan or scholarship, and for that purpose the State Medical Education Board may propound such examination to each applicant which is deems proper. The said State Medical Education Board may also prescribe such rules and regulations as it deems necessary and proper to carry out the purpose and intention of this part. The investigation of the applicant shall include an investigation of the ability of the applicant, and of the parents of such applicant, to pay his or her own tutition at such medical school, and the State Medical Education Board in granting such loans and scholarships shall give preference to qualified applicants who, and whose parents, are unable to pay the applicant's tutition as such a medical school.

* * *

20-3-513. Determination of amount by board; terms and conditions; repayment in services.

Students whose applications are approved shall receive a loan or scholarship in an amount to be determined by the State Medical Education Board to defray the tuition and other expenses of the applicant in an accredited four-year medical school in the United States which has received accreditation or provisional accreditation by the Liaison Committee on Medical Education of the American Medical Association or the Bureau of Professional Education of the American Osteopathic Association for a program in medical education designed to qualify the graduate for licensure by the Composite State Board of Medical Examiners of Georgia. The loans and scholarships shall be paid in such manner as the State Medical Education

Board shall determine and may be prorated so as to pay to the medical college or school to which any applicant is admitted such funds as are required by that college or school with the balance begin paid directly to the applicant; all of which shall be under such terms and conditions as may be provided under rules and regulations of the State Medical Education Board. The loans or scholarships to be granted to each applicant shall be based upon the condition that the full amount of the loans or scholarships shall be repaid to the State of Georgia in services to be rendered by the applicant by practicing his or her profession in a State Medical Education Board approved community in Georgia of 15,000 population or less according to the United States decennial census of 1980 or any future such census or at any hospital or facility operated by or under the jurisdiction of the Department of Human Resources or at any facility operated by or under the jurisdiction of the Department of Corrections or at any facility operated by or under the jurisdiction of the Department of Children and Youth Services. For each year of practicing his or her profession in such State Medical Education Board approved location, the applicant shall receive credit for the amount of the scholarship received during any one year in medical school, with the interest due on such amount. (Code 1981, § 20-3-513, enacted by Ga. L. 1983, p. 951 § 1; Ga. L. 1984, p. 22, § 20; Ga. L. 1985, p. 283, § 1; Ga. L. 1985, p. 1122, § 1; Ga. L. 1996, p. 265, § 1.)

43-34-3. Continuing education requirement.

(a) The board shall be authorized to require persons seeking renewal of a license or certificate under this chapter to complete board approved continuing education of not less than 40 hours biennially. The board shall be authorized to approve courses offered by institutions of higher learning,

specialty societies, or professional organizations, including, but not limited to, the American Medical Association, the National Medical Association, and the American Osteopathic Association, the number of hours required, and the category in which these hours should be earned.

* * *

43-34-20. Definitions.

As used in this article, the term:

(1) "Board" or "Board of Medical Examiners" means the Composite State Board of Medical Examiners.

(2) "Internship" or any other similar term includes a clinical training program which is defined and approved by the board as a substitute for an internship.

(3) "To practice medicine" means to hold one's self out to the public as being engaged in the diagnosis or treatment of disease, defects, or injuries of human beings; or the suggestion, recommendation, or prescribing of any form of treatment for the intended palliation, relief or cure of any physical, mental, or functional ailment or defect of any person with the intention of receiving therefor, either directly or indirectly, any fee, gift, or compensation whatsoever; or the maintenance of an office for the reception, examination, and treatment of persons suffering from disease, defect, or injury of body or mind; or attaching the title "M.D.," "Oph.," "D.," "Dop.," "Surgeon," Doctor," "D.O.," "Doctor of Osteopathy," either alone or in connection with other words, or any other words or abbreviations to one's name, indicating that such person is

engaged in the treatment or diagnosis of disease, defects, or injuries to human beings, provided that the terms "doctors of medicine," "doctors of medicine licensed to practice in the state," and similar terms wherever used or appearing in this article or elsewhere shall mean and include only those persons who are licensed to practice medicine under this article.

* * *

43-34-21. Creation of board; members; advisory committee; breast cancer booklet; impaired physicians programs.

(a) A board is established to be known as the Composite State Board of Medical Examiners. All members of the board shall be citizens of the United States and residents of this sate. All appointments to the board shall be made by the Governor and confirmed by the Senate.

(b) Twelve of the members shall be practicing physicians of integrity and ability and shall be duly licensed to practice in this state. Ten of the 12 physician members shall be graduates of reputable medical schools conferring the M.D. degree; the other two physician members shall be graduates of reputable osteopathic schools conferring the D.O. degree. All of the physician members shall have been engaged in the active practice of their profession within this state for a period of at least five years. Any vacancy occurring in a post held by a holder of the D.O. degree shall be filled by a D.O. from the state at large.

(c) The thirteenth member of the board shall be appointed from the state at large and shall have no connection whatsoever with the practice of medicine.

Appendix C

(d) The board shall perform such duties and possess and exercise such powers relative to the protection of the public health and the control of regulation of the practice of medicine and osteopathy as this chapter prescribes and confers upon it and shall have the power to carry out investigations, either through the joint-secretary or independently; provided, however, that the member of the board who is not a practicing physician may vote only on matters relating to administration and policy which do not directly relate to practical and scientific examination of physicians in this state.

* * *

(f) The board shall examine applicants to test their qualifications to practice medicine.

* * *

APPENDIX D — APPLICATION

DATE: February 9, 1987
March 2, 1987 - 2nd Request

APPLICATION IS IN OFFICE
OF FRANCES BROWN

TO: CHIEF, Dr. Earl L. Creech, Orthopedic Service

FROM: CHAIRMAN, Credentials Committee

SUBJ: Request for Recommendation

R. Derry Crosby, D.O. has made application for privileges as a Member of our *Provisional* Medical Staff, with privileges in the Department of *Surgery, Orthopedic* Service. In accordance with Article V, Section 2, sub-section a, please have your Service meet and "provide the Credentials Committee with specific, written recommendations for delineating the practitioner's clinical privileges." Please indicate your Service's recommendations below and return to the Administration Office by ____. (Use second sheet if necessary.)

It is the opinion of the orthopedic service that this individuals training and experience does not make him eligible for board exams by the American Academy of Orthopedics. Accordingly, the By-Laws of SGMC clearly state that he cannot be eligible to be credentialed on active staff.

It is also felt that there are more than enough orthopedic surgeons active on the staff and in the Valdosta area at this time.

He may be eligible for staff privileges at the Smith Hospital if he wishes to practice in Lowndes County.

Appendix D

Earl L. Creech, M.D.
(Chief of Service)

APPLICATION AVAILABLE FOR REVIEW
MEDICAL STAFF COORDINATOR'S OFFICE.

CC: Dr. Quattlebaum, Chairman
Credentials Committee